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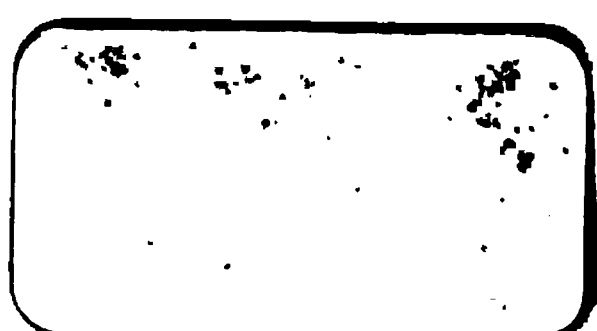
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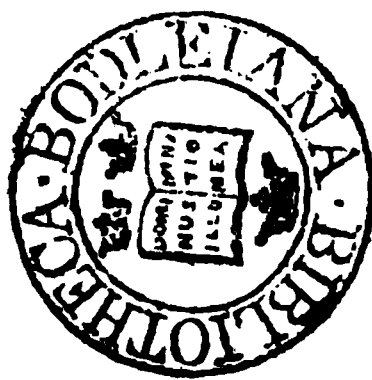
GROUNDING ON
THE TEXT OF COMYNS,
AND EMBRACING THE IMPORTANT PARTS OF
WOODFALL AND CHAMBERS.

BY
RICHARD HOLMES COOTE,

OF LINCOLN'S INN, ESQ., BARRISTER AT LAW.

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PREFACE.

SOME explanation may probably be expected on the appearance of the present Work on a subject which has been already so ably treated by preceding Authors. But the great changes made within the course of the last few years, both in our laws and in the practice of our Courts, seemed to point out the present as a fit moment for a careful revision of the Law of Landlord and Tenant, and this Work was undertaken with that view.

In considering the course which for such purpose I would adopt, I determined on taking the text of the excellent Treatise of Mr. COMYNS as my ground-work, having at the same time reference to the Treatises of WOODFALL and CHAMBERS and making omissions and additions as the change of circumstances and of the law might require.

A Work so framed would necessarily comprehend the important parts of all those Treatises.

On this plan I have proceeded in the formation of this Work—in the course of which all the older authorities have in

general been reviewed ; the new rules of Court, bearing on the subject, have been introduced ; and I have endeavoured to notice every decision on the subject up to the present time, which I can assure the Reader was no trifling labor.

I should be ungrateful did I not acknowledge the great assistance I have received from the recent Editions of the Treatises of SELWYN, CHITTY, and TIDD, on the Law of *Nisi Prius* and *Pleading*, and the Treatise of Mr. Serjeant ADAMS on *Ejectment*, and beg to express my obligations to those learned Authors.

Omissions and errors in a Work of such extent as the present are inevitable, but I would fain hope they are not numerous or important.

I have found the task of completing this Work a heavy addition to the duties of an anxious and laborious profession, and with corresponding pleasure have brought it to a conclusion ; but I shall be repaid if it receives the approbation of the profession, to whose kind judgment I freely commit it.

RICHARD HOLMES COOTE.

*Stone Buildings, Lincoln's Inn,
April, 1840.*

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ERRATA.

Page 21, line 8, for "removal" read "renewal."
106, 22, for "reservation" read "privilege."
170, 6, after "pro rata" read "sed vide, supra, p. 165."
176, in note, for "Broadstreet" read "Bradstreet."
284, in margin, for "demise" read "devise."
558, line 12, for "landlord" read "tenant."

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BOOK THE FIRST.



CHAPTER THE FIRST.

*Of the Relation of Landlord and Tenant ; its Origin ;
and what Estates may be thereupon holden.*

A lease is *a contract* for the possession and the profits of lands and tenements on the one side, and a recompence of rent or other consideration on the other. (a) A lease for years may be made by deed, by writing not being a deed, and if not exceeding three years in duration, by parol.

Definition of
lease by con-
tract.

The relation of landlord and tenant may be also effected by means of *conveyance* in consideration of a return of rent or other recompence.

Relation of
landlord and
tenant by con-
veyance.

The party letting or conveying the lands is the lessor or landlord, and the party to whom the lease or conveyance is made is the lessee or tenant.

The king, by the law of England, is the supreme lord of the whole soil, whoever, therefore, holds lands, must hold them mediately or immediately of him ; and while the subject enjoys the usufructuary possession, the absolute and ultimate dominion remains in the king. (b)

Accordingly, the subject to whom the king granted lands,

(a) 4 Bac. Ab. 1.

(b) Co. Lit. 1. a.

as they were to be *holden* of him by some prescribed service, was called his *tenant*; the lands or possessions granted, the *tenement*; and the manner in which they were held, the *tenure*.

Land being granted to a man, a *fief* was thereby created; and according to the early feudal institutions, such tenant again granted out portions of his land to other subjects; and thus became himself the lord of tenants, who held of him by service in like manner as he held of his sovereign. Still the king remained the lord paramount over all; his immediate tenants being specially denominated tenants *in capite*.

But as the unrestrained alienation of such *fiefs* would obviously have proved fatal to the feudal system, where so much depended upon the personal services of the tenant, no man seems to have been permitted to alien his lands, unless by the express licence of his lord. And though the strictness of this rule was softened down by the laws of king Henry I. whereby a man might alien the lands which he himself acquired to hold to him, his heirs, and *assigns*, (c) still he was not permitted to dispose of those lands which had been transmitted to him by his ancestor to the disinheri-
 tance of his children. (d) *Magna Charta* (e), however, expressly allowed a man to dispose of his land, provided he left enough to supply the services due to his lord: and the statute of *quia emptores* (f) empowered all men (except tenants *in capite*) to alien their lands at their pleasure; and removed all the difficulties arising from the multiplication of *mesne* tenures, by enacting that the alienee should hold, not of the alienor, but of the chief lord of the same fee. The consequence of this enactment in practice is, that on a conveyance in fee, although part of the estate, such as mines or the like, may be *excepted* out of the grant; yet no privity of

(c) LL. Hen. I. c. 70.

(d) Glanvil. lib. 7. c. 1.

(e) 9 Hen. III. c. 32.

(f) 18 Edw. I. c. 1.

estate remaining, there cannot, in strictness, be a legal reservation. (g) This rule of law applies to cases in which estates have been sold in consideration of a perpetual rent. In some instances, those rents have been reserved to the grantor and his heirs as rent service, but as the grantor has no reversion, those reservations, although maintainable as rents charge, cannot be supported as rents service. (h) The better mode of limiting those rents, is through the medium of the statute of uses, that is, by a grant of the inheritance to a releasee and his heirs, to the use and intent that the grantor and his heirs may receive the proposed rent, and to the further use and intent that he may distrain, &c. and subject to these uses then to the proposed uses in favour of the purchaser and his heirs.

By the statute 1 Edward III. c. 12, tenants *in capite* were also allowed to alien upon payment of a fine to the king; which fines were at length totally abolished, in the case of freehold lands, by the statute 12 Charles II. c. 24. At this day, therefore, a man may dispose of all or any part of his freehold at pleasure, according to the quantity of his estate; the king remaining the ultimate lord of the soil. (i)

By such alienations is the relation of landlord and tenant by way of conveyance constituted. In the case of a feoffment, the feoffee will be tenant, not of the feoffor, but according to the statute of *quia emptores* of the superior lord of the same fee, who will be entitled to enter for an escheat. Where, however, the lands are aliened in fee *upon a condition*, the alienor or his heir, and not the superior lord, will be entitled to enter for the condition broken. (k) And in the case of lands given to a corporation, such lands, upon the dissolution of the corporation, will return to the donor or his heirs, although he had entirely parted with the estate, and no reversion was left in him. (l) These two latter cases

(g) Co. Litt. 143, n. 1.

(k) Lit. s. 325. Co. Lit. 202. b.

(h) See 3 B. & Ad. 860.

(l) Co. Lit. 13. b.

(i) 2 Bl. Com. 287.

are instances of a *right of reverter*, in which no *estate* is left in the grantor beyond a possibility of re-entry on the determination of the grant in fee, the grantee in the meantime holding of the superior lord of the same fee.

In the case of tenant in tail, who at common law was tenant of a conditional fee, the donor or his heir retains the right of entering upon the tenant's death without issue, and in this case an actual reversion remains in the grantor.

Tenant for life, whether for his own life, or *pur autre vie*, may be made according to the quantity of the estate vested in the alienor; and, as the statute of *quia emptores* applies only to estates in fee, the tenant will hold of the grantor.

Lives should
be existing on
grant of lease
pur autre vie.

In the grant of an estate *pur autre vie*, the lives should be in existence at the date of the grant, for where a lease was granted for the lives of two persons in existence and a grandchild not then born, the lease was confined to the two existing lives. (m)

Lease for life.

An estate for life may be created by deed, either by *express* limitation, or by a grant in *general* terms. For where a grant is made by tenant in fee to a man, or to a man *and his assigns*, without any limitation in point of time, this will be taken as an estate for life; and it shall enure for the life of the *grantee*, and not of the grantor, or other person. (n) It has been held that a grant without limitation of time by tenant in tail shall only be taken as a grant for the life of the *grantor*; because a man seised of such an estate of inheritance has no power at common law to bind the estate for a longer period than his own life. (o) But it having been decided that a conveyance in fee by a tenant in tail, will carry

(m) Doe dem. Pemberton v. Edwards, 1 Mees. & W. 553.

(n) Co. Lit. 42. a. Where a grant is expressed to be for the life of a person, it will expire on the civil

death of *cestui que vie*, unless there be something to shew that it meant the natural life. Archb. of Canterbury's case, 2 Rep. 48.

(o) Co. Lit. 42. a.

a base fee, and the estate will continue until avoided by entry of the issue in tail ; (s) it would probably be now held, that an unlimited grant by tenant in tail, would be a grant for the life of the grantee, if not sooner determined by the entry of the issue.

Where a grant is made subject to be defeated by a particular event, this, provided there be no limitation in point of time, will, *ab initio*, be a grant of an estate for life, as much as if no such event had been in contemplation. As if A. grant lands to B. *quamdiu se bene gesserit* ;—or to a woman *durante viduitate* ;—or until the grantee obtain certain preferment ;—or so long as he shall inhabit ;—in each of these cases, as there is no certainty of the estate's being put an end to by the misconduct, marriage, preferment, or change of habitation, of the respective lessees, the estate is as perfect an estate for life until such event take place, as if it had been granted absolutely. (t)

For life determinable.

At common law a lease for life must commence *in presenti*, and cannot be made to commence *in futuro*. (u) Therefore, a lease for life, to begin at *Michaelmas* next, or from the death of J. S., will at common law be void. (v) And leases for lives can only take effect by livery of seisin, covenant to stand seised, or such other conveyance as is required for the transfer of estates of freehold. (w) But, although such is the doctrine at common law as to leases *in futuro*, a very different rule of law prevails in cases of limitations taking effect under the statute of uses or as devises or trusts—in all which cases, estates for life may be made to commence *in futuro* by way of springing or future use, within the prescribed limits, *viz.* a life or lives in being and twenty-one

Lease for life at common law.

Difference if under the statute of uses, or by way of devise or trust.

(s) *Machell v. Clark*, 2 *Ld. Raym.* 778.

(t) *Co. Litt.* 42. a.

(u) *Shep. Touch.* 272.

(v) *Shep. Touch.* 272. Though this will be sometimes helped by the livery. *Ibid.* 219. And see

Greenwood v. Tyber, *Cro. Jac.* 563.

S. C. Palm. 29. 2 *Rol. Rep.* 366.

Owen v. Aprees, *Cro. Car.* 94.

Mellows v. May, *Cro. Eliz.* 873.

Freeman dem. Vernon v. West, 2 *Wils.* 165.

(w) *Shep. Touch.* 210.

years afterwards, the use or trust in the meantime resulting to the grantor, or the heir of the devisor.

Lease for years. A demise for years has been already defined to be a *contract* for the possession and the profits of lands and tenements, and is made for some *determinate period*, whereby the lessor lets them to the lessee for a certain *term* of years agreed upon between the parties; and thereupon the lessee enters. (*x*) Though the lease be but for half or a quarter of a year, the lessee is considered as a tenant for years, a year being the shortest period which the law in this case takes notice of. (*y*) Such estate is usually denominated “a term,” —*terminus*; which word signifies not only the limitation of time, but the estate and interest that pass for such time. (*z*)

It is said by Sir Edward Coke, “that by the ancient law of England for many respects a man could not have made a lease above forty years at the most, but that the ancient law was antiquated.” (*a*) Mr. Justice *Blackstone*, however, has produced instances of leases for a much longer period, so early as the reign of king Richard II. (*b*) But it is certain that the estate of tenant for years was, at common law, constantly in danger of destruction by a fictitious recovery had by the collusion of the lessor and a stranger; an evil which was not overcome, until the passing of the statute 21 Henry VIII. c. 15, whereby tenant for years was allowed in all cases to falsify fictitious and collusive recoveries. (*c*)

But though tenant for years is now possessed of a sure and indefeasible estate, and though by the creation of a long term he may acquire an interest of more extensive duration, and higher value, than if he were seised of an estate for life, the ancient notion of the inferiority of an estate for years is still in great measure attached to it, so much so, that a term

(*x*) Lit. s. 58.

(*y*) Lit. s. 67. 2 Bl. Com. 140.

(*z*) Co. Lit. 45. *b*.

(*a*) Co. Lit. 45. *b*.

(*b*) 2 Bl. Com. 142.

(*c*) Vide *Cooper v. Denne*, 1 Ves. jun. 567.

of any duration merges by its union in the same right with an estate of freehold ;—and it is at this day merely looked upon as a *chattel interest*, which passes, not to the heir with the freehold, but amongst the personal property to the executor or administrator. (*d*) And so terms of years made to a corporation sole will go to his executor or administrator, and not to the successor, (*e*) except in the instance of the chamberlain of the city of London. (*f*)

An estate for years may be made to commence *in presenti* or *in futuro*; (*g*) and neither livery of seisin, nor any of the more formal modes of conveyance, are necessary to the creation of a term: except, indeed, that by the statute of frauds, if the term exceed three years, the lease must be in writing.

The contract between the lessor and lessee gives the lessee a right to enter upon the lands, and imparts to him a present interest, or *interesse termini*; and when in pursuance of such right he enters upon the land, the object of the contract is accomplished. The *term* is vested in the lessee; the *seisin* in the land still remaining in the freeholder. (*h*)

An *interesse termini*, is merely an executory interest and the right to entry under it, except when depending on an estate tail cannot be barred or affected before the time when an entry would be authorized by the lease, grant, or limitation conferring the interest. When that period is arrived and the actual right to the possession has accrued, it may be barred like any other right of entry, but although it may be thus barred, it cannot, until it is executed in possession by the entry of the party entitled under it, be divested so as to prevent it from being transferred to a stranger. (*i*)

Interesse termini.

(*d*) Co. Lit. 46, *b*.

Winter v. Loveday, Com. Rep. 39.

(*e*) *Ibid*.

(*h*) Lit. s. 58.

(*f*) 2 Bac. Ab. 14.

(*i*) 4 Bac. Ab. 195, *et vide* Watk.

(*g*) Barwick's case, 5 Rep. 94. *a*.

Convey. 7 Edit. 34.

Such an interest cannot, before entry, be enlarged by a release from the lessor, on account of there being merely an interest, and not an actual estate in the lessee ; but a release to the lessee before entry by the lessor of all right that he has in the land, will in respect of the privity between them, extinguish the rent. (*k*)

The lessor may for the same reason expressly release the rent before entry. (*l*)

The *interesse termini* may also be extinguished by *release* before entry to the lessor, but it cannot be surrendered, and will not *merge* in the freehold subsequently acquired. (*m*)

Lease for years
determinable.

A term may be liable to be avoided by some event agreed upon at its creation ; as if a lease be made for twenty years, *provided J. S. so long live* ; yet the lessee will have a term for twenty years, though the death of J. S. may put a premature end to it : for what was before said of a conditional lease for life, will apply to a conditional term of years.

Grant without
limitation of
time.

But sometimes a grant of lands is made without any limitation in respect of time. Where the form of the grant is such as will pass an estate of freehold, that is, if it be by feoffment, lease and release, bargain and sale enrolled, covenant to stand seised, or being in remainder or reversion, by grant, it will, though indefinite as to time, operate, as we have before seen, as an estate for life ; but where no conveyance is made, sufficient to pass a freehold estate, such demise would, according to the older authorities, create no more than an estate at will ; and so where a man granted to another the rents and profits of lands ; or gave him licence to take the profits ; without mentioning for how long a period, or reserving any *annual* rent, whereby it might have

(*k*) Co. Litt. 270. *b*.
(*l*) *Ibid*.

(*m*) Doe dem. Rawlins v. Walker, 5 B. & C. 111.

been intended that it was meant as a demise for a year. (n) Indeed, as the law formerly stood, wherever a man *entered* into land *with the consent* of the owner, and no express time was limited for his enjoying it, he was tenant at will; as where he entered *by consent of the owner* under a void or imperfect conveyance of the freehold, as a feoffment or lease for life without livery: (o) although if he entered merely under colour of such conveyance, *without* the express consent of the owner, he was not tenant at will, but a disseisor, inasmuch as no consent can be implied from a mere conveyance, which is insufficient to effect the original intention of the parties. (p)

But if a man entered into land without even any colour of title, or if lessee for years held over his term, and the owner of the land accepted rent of him, by such acceptance he became tenant at will. (q)

According to the strict letter of the old law, such tenancy, as it existed only by the *mutual* will of both lord and tenant, might be put an end to at any time by either party. (r)

An estate so precarious, and so generally prejudicial to the interests of agriculture, has long been looked upon with increasing strictness; and it is now clearly settled that where the relation of landlord and tenant is created without any limitation as to time, such *tenancy*, except in the case of lodgings, or an express agreement to hold at will, or a tenancy by sufferance, or under a contract, shall be *from year to year*; not determinable at the will of either party; nor even at the

Tenancy from
year to year.

(n) Lit. s. 68. Co. Lit. 55. a. Griffin's case, 2 Leon. 78. Geary v. Bearcroft, Carter, 60. Regina v. Winter, 2 Salk. 588. Anon. 3 Salk. 223.

(o) Lit. s. 70. Corbet v. Stone, Sir T. Raym. 147. 1 Rol. Abr. 858. l. 45.

(p) Tooker v. Squire, 1 Rol. Abr.

859, l. 31. Buckler v. Harvy, Cro. Eliz. 451, 585. S. C. 2 Rep. 55. b. Bull v. Wyatt, Cro. Car. 388.

(q) Anon. 4 Leon. 35. Sir Thomas Bowe's case, Alleyn, 4.

(r) Co. Lit. 55. a. 2 Bl. Com. 145. Leighton v. Theed, Ld. Raym. 707. S. C. 3 Salk. 222. But see Title v. Grevett, Ld. Raym. 1008.

Determination
of lease from
year to year.

end of the current year; unless by a notice to quit, regularly served by the party intending to dissolve the tenancy: so that, unless such notice be given, the tenancy may run on from year to year until some extraordinary event spring up to destroy it. (*s*) A tenancy from year to year will not be determined unless there be a legal notice to quit, or a surrender in writing or in law, and will not be determined until the regular determination of the tenancy, although the premises are destroyed by fire. (*t*)

Parol lease for
more than three
years.

By the Statute of Frauds, parol leases for more than three years are to have effect only as estates at will. But as a tenancy at will generally is now considered a tenancy from year to year, on the like principle, a parol lease for more than three years is construed as creating a similar tenancy, the terms of which as to rent, &c. will be regulated by the parol agreement. (*u*)

Holding over
with consent or
under assign-
ment of void
lease.

If a tenant holds over after the expiration of his term with permission of his landlord, but without any fresh contract, he will become tenant from year to year, and will hold on the terms of his original lease, (*v*) and the same doctrine applies, if he enters under an assignment of a void lease. (*w*) But in order to raise the implied agreement, he must produce the lease in evidence, which, if not properly stamped, he cannot do. (*x*)

Lodgings.

The case of lodgings is an exception to the rule; the notice

(*s*) *Legg v. Strudwick*, 2 Salk. 414. *Timmins v. Rowlinson*, Burr. 1609. *Leighton v. Theed*, *ubi sup.* *Roe dem. Bree v. Lees*, Bl. Rep. 1172. *Doe dem. Shore v. Porter*, 3 T. R. 16. *Rex v. Inhabitants of Stone*, 6 T. R. 297. *Doe dem. Martin v. Watts*, 7 T. R. 83. *Clayton v. Blakey*, 8 T. R. 3. *Doe dem. Warner v. Browne*, 8 East, 1654. *Rees dem. Mears v. Perrott*, 4 C. & P. 230.

(*t*) *Taylor v. Chapman*, *Peake's*

Add. Cas. 19. *Stevens v. Whitney*, 2 Stark. 235. *Doe dem. Read v. Ridont*, 5 Taunt. 519. *Izon v. Gorton*, 5 Bing. 501. N. S.

(*u*) *Doe dem. Rigge v. Bell*, 5 T. R. 471. *Clayton v. Blakey*, 8 T. R. 3.

(*v*) *Rigge v. Bell*, *supra*.

(*w*) *Walliss v. Broadbent*, 4 Ad. & Ell. 877.

(*x*) *Beale v. Sankey*, 3 Bing. 850. N. S.

required in such cases being in most cases regulated by local custom, which generally requires the same space of time for notice as the period for which the lodgings are taken. (y)

If an annuitant enter under powers in his annuity deed, and the tenant attorn and pay rent, and distresses are made by the annuitant, and a six months' notice to quit given, a tenancy from year to year is created between the annuitant and the tenant in possession, determinable on payment of the arrears on which the lease for years under which the tenant holds will revive. (x) Annuitant.

An agreement in writing for a yearly tenancy is not altered by the tenant agreeing to pay his rent quarterly, and actually doing so, and therefore a distress for a quarter's rent would be illegal. (a) An allegation in a declaration that the tenant held from year to year is not supported by proof of an agreement, that he should become tenant at a certain rent per quarter, paying a quarter's rent in advance so long as he should continue tenant. (a)

A tenant from year to year may demise from year to year, or may assign his term, or may underlet part of it as for three quarters of a year or so many months,—for a tenant has it as a right incident to his tenancy to make a sub-tenancy, in order to which it is by no means necessary to have the first landlord's assent, unless by some agreement between him and his lessor his power is circumscribed. (b) Underletting
by tenant from
year to year.

A demise from year to year by a tenant who holds from year to year, is in legal operation, a demise from year to year, during the continuance of the original lease and is so properly described in pleading. (c)

(y) *Vide infra.*

(z) *Doe dem. Chawne v. Boulton*, 1 Nev. & P. 650.

(a) *Turner v. Allden*, 1 Tyr. & Gr. 819.

(a) *Wilkinson v. Hall*, 3 Bing. 510. N. S.

(b) *Vide Rex v. Aldborough*, 1 East, 598.

(c) *Pike v. Eyre*, 9 B. & C. 909.

If tenant for years underlet from year to year, and on the expiration of his term hold on by agreement with his landlord from month to month, the former tenancy with the tenant from year to year will in the absence of any express agreement to the contrary be held to continue. (*d*)

Strict tenant at will.

This modern doctrine of tenancy from year to year extends to cases where a tenancy at will was anciently *implied*, and does not affect cases where the parties create a tenancy at will by the very terms of the demise. (*e*) For if two parties agree to let certain premises so long as both shall please, reserving a compensation accruing *de die in diem* without reference to any aliquot part of a year, this will be strictly a tenancy at will. (*f*) Where a person is suffered by the owner to live in a house, *rent free*, without any limitation as to time, such person is still, in the eye of the law, tenant at will. (*g*)

Adverse possession by tenant at will.

By the 7th section of the 3 & 4 Wm. IV. c. 27, it is enacted, that when any person shall be in possession as tenant at will, the right of the person entitled subject thereto, to make an entry or distress, or bring an action to recover such land, shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined. On this section it has been decided, that it will not apply to the case of a tenant at will who quitted possession before the passing of the act, though he had been twenty years in possession without payment of rent. (*h*)

Adverse possession by tenant from year to year.

By the 8th section it is provided, that when any person shall be in possession as tenant from year to year, or other period, without lease in writing, the right of the person en-

(*d*) *Pierce v. Starr*, 2 Man. & Ryl. 418.

(*e*) See Co. Lit. 55. *a.* note (3).

(*f*) *Richardson v. Langridge*, 4 Taunt. 128.

(*g*) *Rex v. Collett, Russ. & Ryan*, C. C. 498. *Rex v. Gobling*, *ibid.* 525.

(*h*) *Doe dem. Thomson v. Thomson*, 6 Ad. & Ell. 721.

titled subject thereto, to make an entry, &c. to recover such land, shall be deemed to have first accrued at the determination of the first of such years or other period, or at the last time when any rent, payable in respect of such tenancy, shall have been received, which shall last happen.

When a lessee has entered under a lease, and the term has run out, such lessee, if he hold over, will be merely tenant by sufferance, until acceptance of rent by the lessor, or other agreement with him. (i) And if tenant for years *surrender*, and then hold over, he will be either tenant by sufferance, or a disseisor, at the election of the landlord. (j) But if the lessor receive rent, or the lessee be permitted to continue on the land for a twelvemonth, a tenancy from year to year will then be implied. (k) There is no privity between the reversioner and tenant by sufferance, and, therefore, a release to him by the reversioner is not of avail to vest the estate in him; (l) and if tenant by sufferance is turned out of possession by his landlord, without demand of possession, he cannot maintain ejectment, having no interest in the land, although it seems he might have trespass. (m)

(i) Co. Lit. 57. b.

(l) Butler v. Duckmanton, Cro.

(j) Pennington v. Morse, Dyer, Jac. 169.

62. a.

(m) Doe dem. Harrison v. Mur-

(k) Doe dem. Hollingsworth v. rell, 8 C. & P. 135.
Stennett, 2 Esp. N. P. 716.

CHAPTER THE SECOND.

*Of the things which may be demised.*Corporeal or
incorporeal.

IT may be laid down as a general rule, "that leases for lives, or at will, or for years, may be made of any thing corporeal or incorporeal, that lieth in livery or grant." (a) Therefore land, advowsons, tithes, toll ways, offices, commons, franchises, estovers, annuities, rent-charges, and corodies, may be leased for years. (b)

Dignities.

But dignities, which are only grantable by the crown, cannot be granted for years. (c)

Advowson.

If an advowson is leased for years, an action of debt may be maintained for the rent agreed on; and if a vacancy occur during the term, the lessee shall present. If the lessee himself accepts a presentation from the lessor, it will be a surrender of the term. (d)

Tithes.

As to tithes, the statute of the 5 Geo. III. c. 17, was passed, confirming leases then already made by ecclesiastical persons, of tithes and other incorporeal hereditaments, for one, two, or three life or lives, or twenty-one years, and to enable them to grant such leases and to bring actions of

(a) Shep. Touch. 268.

Reynel's case, 9 Rep. 97. b.

(b) Bac. Abr. *Leases* (A).

(d) Gybson v. Searls, Cro. Jac.

(c) Co. Lit. 16. b. Sir Geo. 84.

debt for the recovery of rents reserved, and in arrear on leases for life or lives. (*e*)

But leases of tithes were unquestioned, if confined to the life of the party making the grant. (*f*)

By a recent statute, (*g*) tithes are in a course of being commuted into rent-charges throughout the kingdom; and by the 88th section of that act it is provided, that it shall be lawful for the lessee, being in occupation of any tithes commuted under that act, by an instrument in writing, under his hand and seal, to be made in such form as the commissioners shall direct, and confirmed under their seal, to surrender and make void the lease by which the tithes are held, or enjoyed by such lessee, at the time of the commutation, so far as the same may relate to the said tithes; and it shall be lawful for the commissioners, by the same instrument, to direct what compensation (if any) shall be given by the immediate lessor of any lessee at rack rent, so surrendering any lease of any such tithes, to such lessee, and what allowance (if any) shall be made by any lessee to his immediate lessor of any such surrendered lease, in consideration of the non-fulfilment of any conditions contained in such lease, and what deduction (if any) shall be made from the rent thenceforth payable by any lessee to his immediate lessor, in respect of other hereditaments which may have been included with the said tithes in any such lease, provided always, that any intermediate lessor, to whom any such lease shall have been surrendered, shall, as regards his immediate lessor, be taken to be the lessee in occupation of the tithes included in the said lease.

Commutation
act.

There are many offices which the public benefit re- Offices.

(*e*) 5 Geo. II. c. 17.

(*f*) Shep. Touch. 241. Brewer

v. Hill, 2 Anst. 413. Bouchier v.

Morgan, *ibid*, 40. 4. Cox v. Brain,

6 Taunt. 95.

(*g*) 6 & 7 Wm. IV. c. 71.

quires should be filled by persons of skill and experience, which, if leased for years, might pass to executors; or might, if the termor died intestate, remain vacant until administration should be granted. Such are offices of public trust; and more particularly those concerning the administration of justice. And, therefore, it was decided in the reign of queen Elizabeth, that such offices as that of marshal of the Marshalsea, warden of the Fleet, *Custos Brevium*, chirographer, clerk of the Pipe, of the king's silver, or of the crown, remembrancer in the Exchequer, or such other officers of the several Courts of Justice, cannot be granted *absolutely* for years. (*h*) But as the inconvenience and danger of their passing to unskilful executors, &c., are avoided by leasing them for years *during the life of the grantee*, such form of demise has been holden to be good. (*i*)

Thus, where one made a grant for years of the stewardship of a court-leet and court-baron, it was held to be void as to the court-leet, being a judicial office; but good as to the court-baron, where the office was merely ministerial; the suitors being the judges of that court: but the grant appearing afterwards to be for years, *determinable upon the death of the lessee*, it was held good for both, because there was no danger of its going to executors or administrators. (*k*)

In one case, the dean and chapter of *Westminster*, who were grantees of the *Gatehouse* prison (since pulled down) to them and their successors for ever, leased it for years to A.; and no objection was made to such lease. (*l*) But there

(*h*) Sir George Reynel's case, 9 Rep. 97. *b*. S. P. Meade *v*. Lenthall, Cro. Car. 587. 3 Mod. 143.

(*i*) Sutton's case, 6 Mod. 57, S. C. Ld. Raym. 1005. And now by stat. 27 Geo. II. c. 17, the office of marshal of the Marshalsea, as well as the subordinate offices in that pri-

son, are made unalienable for years by the patentee of the crown.

(*k*) Howard *v*. Wood, Sir T. Jones, 126. S. C. 2 Lev. 245.

(*l*) Rex *v*. Lady Broughton, 2 Lev. 71. S. C. 3 Keb. 32. Sir T. Raym. 216.

seems a difference between this case and that of the marshal of the King's Bench: for in the latter, the objection was to the crown's granting an office relating to the administration of justice for years: but in the case of the Gatehouse, the dean and chapter, who were the immediate grantees of the crown, were themselves perpetual goalers, and still remained liable to the crown as such. (*m*)

Such offices as merely require common diligence, and may be executed by deputy without any ill consequence to the public, may be leased for years.

Therefore the offices of postmaster-general, (*n*) king's printer, (*o*) warden of ports and havens, (*p*) gun-founder, (*q*) park-keeper, (*r*) gauger, (*s*) aulnager, (*t*) garbler of spices and registrar of policies of assurance in London, (*u*) and such as are merely ministerial in courts of justice, as surveyor of the green-wax, sealer of writs and subpœnas, (*v*) &c.; have all been granted for years, and the grants have been deemed good.

Goods and chattels may also be leased for years. Thus cattle and other live and dead stock may be demised by themselves, and the lessee shall have the use and profit of them during the term.—The lessor can, however, have no certain reversion in live animals; for though the lessee will have no right to sell or destroy, or give them away, yet if they happen to die during the term, they become the absolute property of the lessee. (*w*)

So, their young shall belong to the lessee, not to the

(*m*) Bac. Abr. *Leases* (A).

(*n*) *Veale v. Prior*, Hardr. 352.

(*o*) *Ibid.* 352.

(*p*) *Ibid.* 354.

(*q*) *Ibid.*

(*r*) *Zouch v. Sir Edw. Moore*,

2 Rol. Rep. 274.

(*s*) Hardr. 354.

(*t*) *Ibid.*

(*u*) *Ibid.* 351.

(*v*) Bro. Abr. *Leases*, 40.

(*w*) Bac. Ab. *Leases* (A).

lessor ; wherein they differ from dead stock ; to which, if any improvement or addition be made, the lessor, at the end of the term, shall have such addition as a part of the original thing demised. (*x*)

(*x*) Bac. Abr. *Leases* (A). Where furniture or goods are let with a house, it is usual to have a schedule thereof affixed to the lease, with a covenant to re-deliver such articles at the end of the term ; for, without such covenant, the lessor will have no remedy but trover or detinue. *Ibid.*

CHAPTER THE THIRD.

Of the Persons who may make demises.

ALL persons seised or possessed of lands and tenements may dispose of them, according to the nature and quantity of their estates, provided they be under no legal disability. Where such disability exists, the demise may be either altogether void, or only voidable.

A lease by a feme covert (not granted under a power) is altogether void; for by marriage the free-agency of the woman is suspended; the husband acquires an immediate right to the rents and profits of her freehold estates, and without his consenting to and joining in the disposal of her lands, all conveyances by her, except by matter of record, or by deed acknowledged as directed by 3 & 4 Wm. IV. c. 74, are void; and over her chattel interests, (not being choses in action,) he has the sole dominion during his life. (a)

Leases by
femes covert.

A lease by an infant or person under the age of twenty-one years (b) will be good, unless avoided by himself upon coming of age, or by his heir in case he die. (c)

Infants.

According to some books, however, if no rent be reserved, or only such a trifle as does not amount to a beneficial return, such lease is *ipso facto* void. (d) But Lord Mans-

(a) Co. Lit. 46. b. 351. b. Daniel v. Uply, Latch 41. Manby v. Scott, Sid. 120. 2 Bl. Com. 293.

(b) By custom in some places an infant is of full age at fifteen to make leases, which shall bind him.

Co. Lit. 45. b.

(c) Ketsey's case, Cro. Jac. 320. Ashfield v. Ashfield, Sir W. Jones, 157. Plowd. 418.

(d) 1 Rol. Abr. 729, l. 50. Lane v. Cowper, Moore 105.

field, in considering the conflicting authorities upon this point, observes, "It has been long settled that an infant may make a lease *without rent to try his title*. Very prejudicial leases may be made, though a nominal rent be reserved; and there may be most beneficial considerations for a lease, though *no* rent be reserved. What seems decisive is, that the *lessee* can in no case avoid the lease on account of the infancy of the lessor; which shews it not to be void, but *voidable* only. And it is better for infants that they should have an election."(*e*)

Very slight acts have been considered as an affirmation of the infant's lease; as where an infant, having made a lease for years, upon his coming of age, said to the lessee, "God give you joy of it;" this was held to be an affirmation of the lease. (*f*)

Lease by infant
in a corporate
capacity.

Those leases only, which are made by an infant in his *natural* character are capable of being avoided. Such as he makes in a corporate capacity will be binding upon him. (*g*)

By infant
king or queen
regnant.

And the leases of the king or queen *regnant*, whether made of lands held in right of the crown or by another title, cannot be avoided on the ground of infancy. (*h*)

Idiots, &c.

An idiot, or person *non compos mentis*, may make leases which will *primâ facie* be binding; though after office found the king, as guardian of non-sane persons, may avoid the lease of such idiot or lunatic: (*i*) and so after his death they may be avoided by his heir. (*k*)

By the 1 Wm. IV. c. 65, infants or their guardians, and feme coverts, or other persons in the place of such infants,

(*e*) Zouch dem. Abbot *v.* Parsons, Burr. 1806. And see Maddon dem. Baker *v.* White, 2 T. R. 161.

(*f*) Anon. 4 Leon. 4.

(*g*) Bro. Abr. *Age*, pl. 80.

(*h*) Case of the duchy of Lancas-

ter. Dyer, 209. *b.* S. C. Plowd. 212. *b.*

(*i*) Co. Lit. 247. *a.* Beverley's case, 4 Rep. 123.

(*k*) *Ibid.*

and feme coverts appointed by a court of equity, and by direction of such court; and committees of lunatics, by order of the lord chancellor, may surrender leases for lives, or for terms of years determinable on lives or otherwise, and such new leases shall be subject to the same trusts, charges, and incumbrances as the old leases. And the fines and costs of removal are to be paid out of the estate of the infant or lunatic, or to be a charge on the leaseholds carrying interest; and the fines and other charges on surrenders by feme coverts, unless otherwise paid, are to be a charge on the leaseholds carrying interest. (*l*)

By the same statute infants, or their guardians, and feme coverts are empowered under the direction of the court to accept, surrender, and grant renewable leases. (*m*)

And infants or their guardians are also empowered to grant building, farming, or other leases under the direction of the court, but no fine is to be taken, and the best rent, regard being had to the nature of the lease, is to be reserved; and the leases, and covenants, and provisions are to be approved by a Master, (*n*) and counterparts are to be deposited in the Master's office for safe custody, until the infant attains majority. But no lease is to be made of the capital mansion, park, or grounds held therewith during such minority.

In order to make an effectual lease, the lessor should not be out of possession of the lands intended to pass thereby; for if he have but a bare right of entry, he cannot assign this to another; whilst, on the other hand, though his possession be merely tortious, as if he be a disseisor, such possession will enable him to make a lease which shall be good against every man except the disseisee. (*o*)

Lessor must not have a mere right.

A woman who has recovered the third part of her hus- Dowress.

(*l*) Sec. 12, 13, 14, 15.

(*m*) Sec. 16.

(*n*) Sec. 17.

(*o*) Bac. Abr. *Leases* (I) 4. Lee v. Norris, Cro. Eliz. 331. Thurston's case, Owen 16.

Bargainee.

Heir.

Estoppel.

band's lands in a writ of dower, cannot make a lease of her share until she obtain possession by execution. (*p*) And where land is conveyed to a man, he cannot make a lease of it until the possession be absolutely vested in him; so that where the conveyance is by bargain and sale, the bargainee cannot make leases before enrolment. (*q*) Where however the conveyance is under the statute of uses, a lease may be made by *cestui que use* before entry; because the possession is vested in him by mere force of the statute. (*r*) So the heir, who has possession in law immediately upon the ancestor's death, may make a lease before he enter; though it will be otherwise, if an abator enter before the heir; for the heir will then be in the situation of a disseisee. (*s*) And wherever there is a lease for a term of years the lessee may assign or underlet the term before entry, by virtue of his *interesse termini*. (*t*)

Though the lessor be out of possession, or have no title to the land, yet the lease will operate as between the parties:—therefore where a lease is made by deed by one who has nothing in the lands, and before the expiration of the term granted he purchases the lands, the lease shall immediately take effect by estoppel; (*u*)—unless, indeed, it appear *by the recital* that the lessor had no interest. (*v*) But if A., tenant for life of B., make a lease by deed for years, and afterwards purchase the reversion in fee, and B. dies, A. may avoid this lease; for it is determined in point of interest upon the death of B. (*w*)

(*p*) Shep. Touch. 269.

(*q*) 27 Hen. VIII. c. 16. *Isham v. Morrice*, Cro. Car. 109. *Bennett v. Gandy*, Carth. 178.

(*r*) 27 Hen. VIII. c. 10. *Dimmock's case*, Hob. 136.

(*s*) *Browning v. Beston*, Plowd. 137. *b*.

(*t*) Co. Lit. 46. *b*. *Saffyn v. Adams*, Cro. Jac. 60. S. C. 5 Rep. 124, *et vide supra*.

(*u*) Co. Lit. 47. *b*. *Sutton's case*,

Cro. Eliz. 140. *Hermitage v. Tomkins*, Ld. Raym. 729. *Smith v. Low*, 1 Atk. 489. *Trevivan v. Lawrence*, 6 Mod. 258. 2 Lord Raym. 1048. Salk. 276. *Goodtitle dem. Faulkner v. Morse*, 3 T. R. 371.

(*v*) *Hermitage v. Tomkins*, 1 Ld. Raymond, 729.

(*w*) Co. Lit. 47. *b*. As the doctrine of estoppels will be frequently adverted to in the course of this

If the lease be made by deed indented of the lessee's own lands, he will be estopped from averring any thing against the lease, but not so if the herbage only is demised. (v)

Treatise, it may not be improper here to consider what is an estoppel;—and who is bound by an estoppel.

I. An estoppel is the concluding of a man from denying a fact after he has once formally admitted it; and this may be either by the record, by writing, or by other matter in pais.—1. Whenever a man has admitted a fact upon the record, he will be estopped from afterwards contradicting such matter. Co. Lit. 352. a. As if a man has levied a fine, he will afterwards be estopped from saying *partes finis nihil habuerunt*. *Edwards v. Rogers*, Sir W. Jones, 459. *Helps v. Hereford*, 2 Barn. & Ald. 242.—And even if the fine has been levied in his name without his privity, he will be estopped from avoiding the fine, and will be left to his remedy against the person so levying it. 1 Rol. Abr. 863. l. 16, 19.—So a man will be estopped by the certificate of a judge. Roll. Abr. *sub. sup.* l. 14. And if a fact appear to have been expressly averred in pleading by a party, or to have been expressly found upon the record, such fact cannot be afterwards contradicted. Co. Lit. 352. a. Therefore, where a *scire facias* was brought against *ter-tenants* reciting the judgment as of a wrong term, and upon *nil tuel* record, judgment was given for the plaintiff, whereupon an *elegit* was sued out, and an ejectment brought, the court held that the defendant was estopped. *Trevivan v. Lawrence*, 1 Salk. 276. 8. C. Lord Raym. 1036. But if the record be *coram non judice*, it

will be no estoppel; 1 Rol. Abr. 863. So, where the whole truth appears by the record, there will be no estoppel. Co. Lit. 352. b. *Smithson v. Smith*, Willes, 401, and a man will not be estopped from averring any thing consistent with the record; as if a deed be enrolled of record, a party may say that *nothing passed by the deed*. 1 Rol. Abr. 862. l. 35.—Neither will a man be estopped from gainsaying a fact alleged, which is not traverseable or material; Co. Lit. 352. b.; as if in an action of debt, a bond be alleged to have been made at A., in another action upon the same bond a party may say that it was made at B. 1 Rol. Abr. 867, l. 16. *Morgan v. Vaughan*, Sir T. Raym. 456. And in order to work an estoppel, the allegation must be direct and positive, and not by way of argument, supposal, or *general* recital. Co. Lit. 352. a. Hence the frequent necessity of pleading with a *protestando*. Co. Lit. 124. b.—2. A man may be estopped by matter of writing not of record; as by deed indented, deed poll, or obligation. As if A. sign a bond conditioned for the performance of covenants in an indenture, he will be estopped from afterwards denying the existence of such indenture. *Jewell v. —* 1 Rol. Rep. 408. And though a *general* recital will not conclude a man, yet he will be estopped from denying any *particular* fact recited in the condition of a bond executed by him. 1 Rol. Abr. 872. l. 7. *Strowd v. Willis*, Cro. Eliz. 362. *Willoughby v. Brook*, *ibid.* 756.

The effect of the estoppel, when the title to the land is not in question, is to prevent the tenant from denying the validity of the lease; as that being a lease for lives it wants

Cullingworth's case, Godb. 177. Paine v. Sheltrappe, Alleyn, 13. Hart v. Buckminster, *ibid.* 52. S. C. Style, 103. Brooke v. Woodward, March, 74. Shelly v. Wright, Willes, 9. Cossens v. Cossens, *ibid.* 25. Oldham v. Langmead, cited 3 T. R. 439. (But see Hayne v. Maltby, 3 T. R. 438.) Where a party acting in a public capacity makes a deed against the express provision of an act of parliament, he will not be estopped from avoiding such deed, especially if such an estoppel would work an injury to the public. Fairtitle dem. Mytton v. Gilbert, 2 T. R. 169. But if A. having *no interest* in certain lands, make an indenture of lease thereof to B., and afterwards purchase such lands, he will be estopped from avoiding such lease. Hermitage v. Tomkins, Ld. Raym. 729.—And on the other hand (as all estoppels must be mutual, Co. Lit. 352. *a.*) the lessee will also be bound; for the whole estate is created by estoppel. Hilman v. Hore, Carth. 247. Trevivan v. Lawrence, *sup.* Palmer v. Ekins, Strange, 817. S. C. Ld. Raym. 1550.—But if *any* interest pass, there will be no estoppel, and the parties may shew any special matter, as that the lessor's estate is determined. Co. Lit. 45. *a.* 47. *b.* Treport's case, 6 Rep. 15. *a.* Brereton v. Evans, Cro. Eliz. 700. Brudnell v. Roberts, 2 Wils. 143. England v. Slade, 4 T. R. 682. Blake v. Foster, 8 T. R. 487, and see 2 Wm.'s Saunders, 418. *n.* (1). But where a lease is made for years, which cannot take effect immediately by reason of a

prior lease of the same premises, the second lease will operate presently by estoppel, and for so much of the term created by the second lease, as may be left after the determination of the first, by way of passing an interest. Hilman v. Hore, Carth. 247. S. C. 1 Salk. 275.—3. An Estoppel may also be by matter *in pais*, though it be not in writing; as by livery, entry, acceptance of rent, &c. Co. Lit. 352. *a.* For where a person assents to an act, and derives a title under it, he cannot afterwards impeach it. Rex v. Stacey, 1 T. R. 4. Therefore, if a widow bring a writ of dower and recover, she shall be estopped from claiming her jointure. Vernon's case, 4 Rep. 5. *a.*—But an estoppel by matter *in pais* determines by *cesser* of the act, deed, &c. which made the estoppel; whereas it is otherwise of an estoppel by matter of record. Co. Lit. 47. *b.* James v. Landon, Cro. Eliz. 36. Brereton v. Evans, *ib.* 700.

II. Parties to the instrument, and privies in blood or estate, may take advantage of an estoppel:—and, therefore, as no estoppel can exist, unless it be reciprocal and mutual, such persons shall also be bound by it. Co. Lit. 352. *a.* 1 Rol. Ab. 875. Brereton v. Evans, *sup.* Hudson v. Robinson, 4 Maule and Selw. 485. Doe dem. Leeming v. Skirrow, 2 Nev. and P. 123. All persons claiming under an estoppel, as the assignee of an estate created by estoppel, may take advantage of it. 1 Rol. Abr. 863. Trevivan v. Lawrence, *sup.* Palmer v. Ekins, Strange, 818.—

livery of seisin ; or should have been by lease and release, or bargain and sale enrolled, or that being a freehold, it cannot be *in futuro* ; for let the lease be what it may, the covenant to pay the rent is good, as otherwise the tenant might hold the land, and yet the landlord have no remedies for the rent. (w) But the lessee may, as will be hereafter mentioned, shew that his lessor's title has determined since the commencement of the lease.

An assignee is estopped by the same deed which estops an assignor. (x)

Where a reversioner or remainder-man makes a lease to commence *in futuro*, such lease will take effect at the time specified for its commencement, provided the lessor or his heir be in possession at such time. If, however, the lessor be not in possession at the commencement of the lease, still the lease will be binding upon the reversion or remainder ; and shall take effect for the number of years remaining, when the lessor or his heir enters the land in virtue of the reversion or remainder. (y)

By reversioner
or remainder-
man.

But where an infant or feme covert, is party to a deed, as this will not estop either of them, it will not estop the other party. Co. Lit. 352. Cro. Eliz. 37. 700.—And so, generally, a *stranger* cannot take advantage of an estoppel ; Co. Lit. *ub. sup.* 1 Rol. Ab. 869 ; except that of a disability appearing upon the face of the record, as outlawry, attainder, &c. *ib.* 128. b. But the king shall take advantage of an estoppel, though he be not a party to the record ; for he is always present in court. 2 Inst. 39. Lastly, it is a rule that where there is an estoppel against an estoppel, this shall set the matter entirely open. 1 Rol. Abr. 874. l. 51. That a release in fee may operate by estoppel, there must be a distinct averment of the seisin

of the releasor. Right dem. Jefferys v. Bucknell, 2 B. & Ad. 278. And, therefore, where A. mortgaged in fee to B., with a recital in the deed, that he was legally or equitably entitled, and A. afterwards obtained a conveyance of the legal estate, and conveyed it to C., it was held that C. was not estopped from setting up the legal estate so acquired by him. *Sed vide* Bensley v. Burdon, 2 Sim. and Stu. *contra*.

(v) Co. Lit. 47. b. *et vide* James v. Landon, Cro. Eliz. 36.

(w) Monroe v. Lord Kerry (in Error), 1 B. P. C. 67.

(x) Taylor v. Needham, 2 Taunt. 278.

(y) Mitford v. Fenwick, And. 288. S. C. Moore, 284.

Leases must be controlled by the quantity and nature of the lessor's interest, with reference to three points :—

I. Whether the interest of the lessor be several or joint.

II. What quantity of interest the lessor has.

III. Whether the lessor be seised *jure suo*, or otherwise.

Joint-tenants.

I. Joint-tenants, being seised of the same estate, may join in making leases of the whole, or may severally lease their undivided shares to a stranger, or to one another. (*x*) But though they are seised *per mie et per tout*, still each has only a right to a moiety, or his other share of the estate, (*y*) and therefore, if one of two joint-tenants make a lease of the whole, only his moiety will pass, (*z*) and so if a lease purport to be made by both, and one do not execute, this is a good lease for the moiety of him only who executed. (*a*)

If one joint-tenant make a lease of his moiety for years, and die before the lessee's entry, the lease will bind the survivor, and the lessee shall retain his interest in the moiety demised, until his term expire. And so one joint-tenant may make a lease *to commence after his death*; and his co-tenant, if he survive, will be bound by it. (*b*)

Co-parceners.

Co-parceners, until partition, have one entire estate; (*c*) and may, therefore, join in a lease; or each may make a lease of his part.

Tenants in common.

But tenants in common, having several and distinct estates,

(*x*) Co. Lit. 186. *a*.

(*y*) *Ibid*.

(*z*) *Ibid. et vide* Bellingham v. Alsop, Cro. Jac. 53.

(*a*) Cartwright's case, cited 1 Ventr. 136.

(*b*) Lit. s. 289. Grute v. Locroft, Cro. Eliz. 287. Harbin v. Barton,

Moore, 395. S. C. Poph. 97. 2 And. 16. Whitlock v. Horton, Cro. Jac. 91. S. C. Moore, 776. Bellingham v. Alsop, Cro. Jac. 25. As to leases by husband and wife, joint-tenants, see *post*.

(*c*) Co. Lit. 164. *a*.

cannot make a joint lease of the whole estate; but such lease shall be taken to be the lease of each for his respective share, and the cross confirmation of each for the part of the other, with no estoppel on either part. (d)

II. The length of leases must in all cases be limited by the quantity of the lessor's estate; for no man can impart to another an estate, which may, by possibility, last for a longer period than that for which he is seised.

Tenant in fee-simple may make leases for lives or years without limitation or restraint. (f)

After the creation of estates tail by the statute *de donis*, tenant in tail might at common law make leases which would be binding upon himself for his life, but not upon his issue or the reversioner, after his death. Such leases, indeed, are not absolutely void at his decease, but may be confirmed or avoided at the pleasure of the issue or reversioner. (g) And acceptance of rent will be a confirmation. (h)

By tenant in tail.

If the tenant make an underlease and the issue accept rent from the underlessee this will be no confirmation of the lease. But if the tenant assign part, and the issue accept rent from the assignee, this will confirm the whole. (i) If the tenant in tail die, whilst the right of the lessee is but an *interesse termini* and the issue enter and alien, the alienee may elect to confirm or avoid the lease. (l) But if the tenant in tail grant an immediate lease and the issue alien without entry, the alienee is bound by the lease by reason that the issue had only a right of entry, which was not alienable. (m)

(d) 1 Rol. Abr. 877. l. 48, 52.
Bac. Abr. *Joint-tenants* (H.) 1.
Mantle v. Wollington, Cro. Jac.
166. Heatherley dem. Worthing-
ton v. Weston, 2 Wils. 232.

(f) Com. Dig. *Estates* (G. 2).

(g) Bac. Ab. *Title Leases* (D).

(h) Doe dem. Southouse v. Jen-
kins, 5 Bing. 469.

(i) Vide Bac. Ab. *Title Leases* (D).

(l) *Ibid.*

(m) Simonds v. Cudmore, 3 Salk.
335.

The leases, however, of tenant in tail are aided by the statute 32 Hen. VIII. c. 28, commonly called the enabling statute; (m) by which tenant in tail is permitted to make leases by indenture for twenty-one years, or three lives, which shall bind his issue, *though not the remainder man or reversioner*. Such leases must, in all points, conform to certain conditions imposed by that statute; thus, by section 2, it is provided, that the act shall not extend, 1. to any leases of lands already leased, unless such old lease be expired, surrendered, or ended, within one year after the making of the new lease; (n) nor, 2. to any grant to be made of any reversion of lands; nor, 3. to any lease of lands which have not most commonly been let for the space of twenty years next before such lease; nor, 4. to any lease to be made without impeachment of waste; nor, 5. to any lease to be made above the number of twenty-one years, or three lives, at the most *from the day of making thereof*; 6. it is provided, that upon such lease there be reserved yearly to the lessors and their heirs so much yearly rent as hath been *most accustomably* paid for such lands *within twenty years next* before such lease; and lastly, it is enacted that the issue or heir in tail shall, after the death of the lessors, have the same remedies against the lessees, their executors and assigns, as the lessors themselves would have had. (o)

In order to bind the issue under the 32 Hen. VIII. it is necessary that the estate tail should be absolutely vested; for where land was given to A. and his wife, and the heirs of the body of *the survivor*, and they made a lease for twenty-one years, agreeably to the provisions of the statute, such lease did not bind the issue; for the estate tail could not vest until the death of one determined which was the survivor. (p)

(m) Copyhold lands are not within this statute, *post*.

(n) But by the stat. 4 Geo. II. c. 28, s. 6, where there are underleases the refusal of the under tenants to surrender their leases

shall not prejudice the original parties. *Vide infra*.

(o) See the particular decisions upon this statute, *post*.

(p) *Lampet's case*, 10 Rep. 51. a.

But by the 3 & 4 Wm. IV. c. 74, contingent estates tail may now be barred by deed enrolled in manner prescribed by that statute, and therefore by such means a lease may be made by a contingent tenant in tail binding both on the issue and the remainder men.

The estates of tenant after possibility of issue extinct, tenant by the curtesy, and tenant in dower, though growing out of the original estate of inheritance, afford them no more than a life interest; such tenants, therefore, stand precisely on the same footing as tenants for life, and are restricted to the like limits in the disposal of their respective lands.

By tenant
après possibi-
lity, curtesy,
and dower.

Tenant for life, whether tenant for his own life, or *pur autre vie*, can make no leases to continue longer than the life on which his own estate depends; (unless a special power to that effect be reserved to tenant for life;) for the lease is absolutely determined and *void* by the falling in of the life. (q)

By tenant for
life.

And such lease, being altogether determined, can never be set up again at law by any act of the remainder-man, as by his acceptance of rent, or allowing the lessee to make improvements after his interest has vested. (r) But if the remainder-man accepts rent, this is an acknowledgment of tenancy from year to year on the terms of the lease; (s) and if the remainder-man has acted *mala fide*, equity will give relief. (t) B. tenant for the life of C., and he in remainder or reversion in fee, join in a lease for years, this, during the life of C. is the lease of B., and the confirmation of him in remainder or reversion; but after the death of C., then this becomes

(q) Bac. Ab. *Leases* (I.)

(s) Doe dem. *Martin v. Watts*, 7

(r) Doe dem. *Simpson v. Butcher*, Dougl. 50. *Jenkins dem. Yate v. Church*, Cowp. 482. *Roe dem. Jordan v. Ward*, 1 Hen. Bl. 97. *Doe dem. Potter v. Archer*, 1 Bos. and Pul. 531.

T. R. 83. Doe dem. *Collins v. Willis*, *Ibid.* 478.

(t) See *Blore v. Sutton*, 3 Mer. 247. *Stiles v. Cowper*, 3 Atk. 692. *Sudg. Powers*, 5 Edit. 375.

the lease of him in remainder or reversion, and the confirmation of B., (t) and there can be no estoppel in this case, because of the several interests which passed from each.

In order to remedy the difficulty of proving the death of *cestui que vie*, the stat. 19 Car. II. c. 6, ss. 1, 2, enacts, that where persons upon whose lives estates have been granted by *copy of Court Roll* or *Lease* shall remain beyond seas, or elsewhere absent themselves in this realm for seven years together, and an action shall be brought by the lessor or reversioner to recover possession of the lands so granted, such persons shall, unless sufficient proof be made of their lives, be accounted dead. Provided, that if such persons shall afterwards be forthcoming, the tenant evicted may re-enter the lands, and recover the *mesne* profits; or, upon proof that *cestui que vie* died after the eviction, then the tenant may recover the profits arising between the re-entry and the death, sect. 5. And by the stat. 6 Ann. c. 18, ss. 1, 4, persons claiming estates in remainder or reversion, after the death of minors, married women, and others, may, upon affidavit that they believe such minor, &c. to be dead, move the Court of Chancery for the production of such minor, &c., and if the guardian of the minor, or the husband of the married woman, &c., neglect to produce the minor, or to make affidavit of the life, &c., the person claiming the estate may enter thereupon. And by sect. 2, upon affidavit that such minor, &c. is alive and beyond sea, the claimant may send over a person to view them. Provided that if, after claimant's entry, it appear that such minor be still alive, the party evicted may re-enter, and recover *mesne* profits, or upon proof that the minor, &c. died after eviction, then the profits accruing due between the re-entry and the death, sect. 3. And by sect. 5, guardians, husbands, &c. holding over after the death of such minors, married women, &c. shall be adjudged trespassers, and be liable to an action for the full value of the profits received during the wrongful possession.

(t) Bac. Ab. *Tit. Leases*. (I.) 2.

On motion made *ex parte* under this statute on the part of a person entitled in fee, subject to a lease for lives, that the parties claiming under that lease might be ordered to produce the persons on whose lives the lease was holden, the order was made accordingly, upon an affidavit such as the statute requires. (u)

If tenant for life make a lease for twenty-one years, and then he in reversion confirm the lease, and afterwards tenant for life dies, though this at first would have determined by the death of the tenant for life, yet the confirmation has made it good, and unavoidable for the whole term; for the reversioner has thereby made himself a party to the lease: and, though it was originally the lease of the tenant for life, and the confirmation of the reversioner, yet after the death of tenant for life it becomes the lease of the reversioner, and the confirmation of tenant for life. But it would have been otherwise, if the lease had been made for twenty-one years, provided tenant for life so long lived; for the confirmation of the reversioner will not make the lease larger than it was at first. (v)

The diversity between the cases is this, (w) that in the first case the lease being made *generally* for twenty-one years, nothing appears to the contrary but that it was a good lease for that time absolutely; for the death of the lessor, which would determine it sooner, does not appear on the lease itself; then when the reversioner, who alone could take advantage of the implied limitation, thinks fit to waive it, and confirms the lease as it was made at first for twenty-one years absolutely, this makes it his own lease, for so much of the time as would have fallen into his reversion by the death of the

(u) *Ex parte Whaley*, 4 Russ. 561.

(v) Co. Lit. 45. a. Bac. Abr. *Leases* (I). *Vide* *Friend v. Eastbrook*, Bl. Rep. 1152, where there being husband tenant for life remainder to wife for life, husband and wife having joined in a demise

(which it was agreed they might do), Gould, J., said, that this could not operate as a confirmation; for the wife's confirmation of the husband's act would be nugatory. 1. Bac. Ab. *Tit. Leases*. (I.) 2.

(w) Bac. Ab. *Tit. Leases*. (I.) 2.

tenant for life; but the death of the tenant for life being made the *express* limitation and circumscription of the twenty-one years in the lease itself, no confirmation of that lease so limited can enlarge it to extend beyond the life of the lessor, that being the express determination affixed to it.

Where a lease is executed by tenant for life, in which the reversioner, being then an infant, is named, and before his execution of it tenant for life dies, the lease is absolutely determined, and no *subsequent* execution by the reversioner can re-establish it so as to bind the *lessee*. (w)

Where tenant for life is created, *with power to make leases for lives or years*, his leases, provided they accord with the terms of the power, will, of course, be binding upon the remainder-man. (x)

By tenant for years.

Tenant for years may assign his whole term, or part with only a portion of it by way of lease. And so a tenant for one year, or for a less period, provided it be fixed and certain, or from year to year, has the same power of assigning or underletting, unless some covenant to the contrary be contained in the original lease. And even if tenant for years make a lease for life, it seems that this will be good for the life, if the term of the tenant for years last so long; though if he make livery of seisin upon it, this is a forfeiture of the estate for years. (y)

By tenant at will.

But strict tenant at will, who holds on the mutual will of himself and his lessor, can never part with his estate in favour of a third person: for the very act of letting in a stranger would be a determination of his own will; and if the lord accept his nominee, such nominee's entry will be the destruction of tenant at will's estate. (z)

(w) *Ludford v. Barber*, 1 T. R. 90.

(x) See *post*, as to the form of these leases.

(y) *Shep. Touch.* 268.

(z) *Jones v. Clerk*, Hardr. 47. *Dinsdale v. Iles*, 2 Lev. 88. S. C. Sir T. Raym. 224. 1 Ventr. 247. *Birch v. Wright*, 1 T. R. 382.

The estate of tenant by copy of Court Roll is, according copyholders. to the strict letter of the law, no more than an *estate at the will* of the lord. In conformity with this doctrine, an attempt by the tenant to create a term, while he himself holds only a precarious interest, is an assumption which at once operates as a forfeiture to the lord. (a) But as he is tenant at will, according to the custom of the manor, he may be empowered by particular custom existing within the manor, to make leases for years; and in the absence of such particular custom, it is laid down by the best authorities, that a copyholder is empowered by the common law to make leases for one year. (b)

But one year is his limit. Therefore where local custom, or the common law, authorizes the making of a lease for a year, and the copyholder makes a lease for one year, and so from year to year for ten years; or from year to year during the life of the lessor; or from year to year excepting one day in each year; or if he make three leases for a year, each year being to commence after the expiration of the other; all such leases will work a forfeiture: for these would be merely so many contrivances to evade the law, and enable the copyholder to make a demise for a term exceeding one year. (c)

But in order to work such a forfeiture, it is necessary that there be a perfect lease, and not a mere covenant. For where a custom warranted a lease for one year, and the copyholder made a lease for one year according to the custom of the manor, and by the same instrument covenanted that, at

(a) *Ever v. Aston*, Moore, 271. *East v. Harding*, Cro. Eliz. 498. S. C. Moore, 392. *Harding v. Turpin*, Hetl. 122. *Eastcourt v. Weeks*, 1 Salk. 186. And so if a term be created merely by way of collateral security. *Richards v. Sely*, 2 Mod. 79, S. C. 3 Keb. 638, *et vide* 1 Watk. Copyhold, 326.

(b) Co. Lit. 58. b. *Melwich v.*

Luter, 4 Rep. 26. *Combes's case*, 9 Rep. 75. b. *Frosel v. Welsh*, Cro. Jac. 403. *Matthews v. Whetton*, Cro. Car. 233.

(c) *Luttrell v. Weston*, 1 Bulstr. 215. Cro. Jac. 308. *Matthews v. Whetton*, Cro. Car. 233. *Wilcock's case*, 1 Rol. Abr. 508. l. 8. But see *Lenthall v. Thomas*, 2 Keb. 267.

the expiration of that one year the lessee should have and enjoy the land for another year, and so on from year to year for ten years, this was held to be no forfeiture; for the demise for one year was agreeable to the manorial custom, and what followed was a mere covenant, and no lease. (d)

Where no custom exists within the manor to warrant leases for more than one year, the lord's licence for any longer lease must be obtained; (e) and the copyholder is bound to keep within the strict terms of such licence; and, therefore, if it be to lease for two years, and he lease for three, it seems that the lease will be bad, even for the two. (f) So, if a copyholder have licence to lease for twenty-one years from the *Michaelmas* last past, and he lease for twenty-one from the *December* next, the lease will be a forfeiture. (g) But he may make a lease for a *less* period than the licence permits; as if he have a licence to lease for three years, and he lease for two, such lease will be good. (h) And so where a copyholder *for life* obtained a licence to lease for five years, *if the lessor should so long live*, and he leased for three years *absolutely*, the lease was holden to be good: because, as his estate must have determined upon his death, "the condition, if he should so long

(d) *Hamlen v. Hamlen*, 1 Bulstr. 189. S. C. (called *Lady Montague's case*), Cro. Jac. 301. And see *Doe dem. Wood v. Morris*, 2 Taunt. 52. *Fenny dem. Eastham v. Child*, 2 M. & S. 255, and *Lufkin v. Nunn*, 11 Ves. 170. An infant's lease may (as we have before seen,) be avoided by him when he comes of age. Such lease, therefore, will not work a forfeiture, until it be confirmed by him. *Ashfield v. Ashfield*, Latch. 199. Godb. S. C. 364. *Sir W. Jones*, 157.

(e) It is said that this licence must be granted by the lord himself, and that the steward of the manor (unless expressly authorized) has no power to make such a grant.

Co. Copyh. sect. 44. But, at all events, the lord's acquiescence in such licence will cure the informality of its origin. The interest of the lord in the manor must always regulate the period for which he may licence; for one seised of a manor for life can only licence, subject to the extinction of his life, and cannot bind the reversion. *Petty v. Debbans*, 1 Rol. Abr. 511. l. 8.

(f) *Haddon v. Arrowsmith, Owen*, 73. S. C. Cro. Eliz. 461. Poph. 105.

(g) *Jackson v. Neal*, Cro. Eliz. 394.

(h) *Goodwin v. Longhurst*, Cro. Eliz. 535.

live" was implied ; (i) though it seems it would be otherwise, if a licence were granted to lease for five years, "*if J. S. should so long live.*" (k) The lease created by the licence will be a common law demise, and will be within the equity of the 32 Hen. VIII. c. 34. (l)

Where a copyholder has a licence to lease for twenty-one years, and he makes one lease for that period, and then makes another for the same term to commence at the same day as the first, though the second lease is void in point of interest, it is said that it will operate as a forfeiture; because the first lease will have exhausted the lord's licence. (m) But where a lease has been regularly made in pursuance of a licence, the lessee may assign or underlet without any new licence for that purpose. (n)

Where a lease of copyhold lands is made in pursuance of the custom, or of the lord's licence, the widow of the lessor (though entitled to her freebench) will be bound by such lease. (o)

But though the lease when made without the licence of the lord, or the authority of the manorial custom, may operate as a forfeiture to the lord, it will in all cases be binding as between the lessor and lessee. (p)

Tenant by sufferance has no interest which he can alien. By tenant by sufferance.

Tenants by *statute* and *elegit*, as they have but a precarious interest, can make no permanent leases; for the pay- Tenants by *statute* and *elegit*.

(i) *Haddon v. Arrowsmith*, *ubi sup.* 508. l. 28.

(k) *Worledge v. Benbury*, Cro. Jac. 436.

(l) *Glover v. Cope*, 4 Mod. 80. *Whitton v. Peacock*, 3 M. & K. 325, *et vide infra*.

(m) *Anon.* Moore, 184.

(n) *Johnson v. Smart*, 1 Rol. Abr.

(o) *Holder v. Farley*, Moore, 758.

S. C. Cro, Jac. 36, *Salisbury dem.* *Cooke v. Hurd*, Cowp. 481.

(p) *Sprake's case*, Moore, 569. S. C. Cro. Eliz. 676. *Downingham's case*, Owen, 18. *Wells v. Partridge*, Cro. Eliz. 469.

ment and satisfaction of the sum secured determines their estate. Subject, however, to this avoidance, a demise by such a tenant is valid in law.

By mortgagee. The mortgagee, by virtue of his mortgage, becomes the legal owner, and consequently entitled at law to the immediate possession, or to the receipt of the rent if the land is in lease.

If the mortgagor grant a lease subsequently to the mortgage, the mortgagee may evict the lessee without notice, (*q*) and have an action for mesne profits; (*r*) and it seems the lessee will not be entitled to emblements. (*s*)

But the mortgagee cannot distrain on such tenant, or sue him for rent until after he has accepted rent, or given the tenant notice to pay him rent, and the tenant has acquiesced; (*t*) and it seems that the recognition of such lessee by the mortgagee is a new tenancy, and the lessee becomes tenant from year to year, on the terms of the lease so granted by the mortgagor. (*u*) If the tenant of the mortgagor in a lease subsequent to a mortgage, refuse to pay the rent to the mortgagee, his only remedy appears to be by ejectment, and an action for the mesne profits; but the tenant is, it seems, justified in paying the rent to the mortgagee due at the time of notice. (*v*)

Although the mortgagee being legal owner, may make a valid lease at law, yet it will not be binding in equity, unless there is an absolute necessity for it. (*w*)

When the estate is discharged of the mortgage, a lease by the mortgagor will be good against himself by estoppel. (*x*)

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|---|---|
| (<i>q</i>) Doe dem. Roby <i>v.</i> Maisey, 8 B. & C. 767. | & Ell. 299. |
| 3 Man. & Ryl. 109. | (<i>u</i>) See Partington <i>v.</i> Woodcock, |
| Doe dem. Fisher <i>v.</i> Giles, 5 Bing. 421. | 5 Nev. & M. 672. Doe dem. Chawner <i>v.</i> Boulter, 6 Ad. & Ell. 675. |
| (<i>r</i>) Pope <i>v.</i> Biggs, 9 B. & C. 245. | (<i>v</i>) Pope <i>v.</i> Biggs, 9 B. & C. 245. |
| (<i>s</i>) Dougl. 22 Coote, Mortg. 2nd Edit. 408. | (<i>w</i>) Hungerford <i>v.</i> Clay, 9 Mod. 1. |
| (<i>t</i>) Rogers <i>v.</i> Humphreys, 4 Ad. | Lucan <i>v.</i> Mertin, 1 Wils. 34. |
| | (<i>x</i>) Omelaughland <i>v.</i> Hood, 1 Rol. Abr. 874. l. 21. 876. l. 10. |

If a lease is made by the mortgagee, in which the mortgagor joins by way of confirmation, yet as the latter could make no legal demise, no covenant can be *implied* from him, and, consequently, an action on an implied covenant on a joint demise cannot be supported. (w)

III. Another circumstance operating to restrain the extent of leases is, that the lessor may be seised of the lands, not absolutely *suo jure*, but merely in respect of his filling some particular office, or in right of some other person.

One or more persons may be seised, not in their natural, but in a corporate and conventional capacity; their estates passing to their successors, whose interest might be injured by their being permitted to alien the lands without restraint. Thus, though the king or queen *regnant* (each of whom is regarded by the law as a corporation sole, the natural person being merged in the royal character,) might at common law have granted leases for lives or years to any extent, and thereby have bound the successors; (x) yet, upon the accession of queen Anne, it was enacted, in restraint of such power, that every grant and lease by the crown of any lands and tenements thereto belonging, (except advowsons of churches and vicarages) for a longer period than thirty-one years, or three lives, or term of years determinable on one, two, or three lives, should be altogether void; which leases are to commence from the date thereof, or if made in reversion or expectancy, then the same, together with the estate in possession, is not to exceed three lives, or thirty-one years in the whole, and such leases are to be so made as that the tenant should be liable to punishment for waste; and there must be reserved not less than the rent usually reserved for the greater part of the previous twenty years; or where no rent shall have been before payable, then not less than a third of the clear yearly value of the lands, &c. demised: such rent to be reserved to the crown,

By the sovereign.

(w) *Smith v. Pocklington*, 1 Cr. & Jervis, 445; 1 Tyrw. 309. (x) *Com Dig. Grant* (G. 3.)

its heirs and successors. Where, however, the greatest part of the yearly value of such crown lands consists in buildings wanting to be repaired or re-edified, there, in order to encourage the rebuilding or reparation of the same, the lease may be extended to fifty years, or three lives from the date or making thereof, under the like provisions as leases for thirty-one years. (y) And by the several acts relative to Regent Street, Charing Cross, the Strand, and the site of Carlton Palace, the Commissioners of Woods and Forests, with the consent of the Treasury, are empowered to grant leases for any term not exceeding ninety-nine years. (z)

By municipal corporations pursuant to 5 & 6 Wm. 4, c. 76.

By the 5 & 6 Wm. 4, c. 76, being "an act to provide for the regulation of Municipal Corporations in England and Wales," it is enacted, (a) that it shall not be lawful for the council of any body corporate to be elected under that act, to sell, mortgage, or alienate the lands, tenements, or hereditaments of the said body corporate or any part thereof, except in pursuance of some covenant, contract, or agreement *bond fide* made or entered into, on or before the 5th day of June, 1835, by or on behalf of the body corporate of any borough, or of some resolution duly entered in the corporation books of such body corporate, on or before the said 5th day of June, or to *demise or lease*, (except in pursuance of some covenant, contract, or agreement *bond fide* made or entered into, on or before the said 5th day of June, by or on behalf of such body corporate, or in pursuance of some resolutions duly entered in the corporation books of such body corporate on or before the said 5th day of June, except in the cases thereafter mentioned,) any lands, tenements, or hereditaments of such body corporate, or any part thereof, or to enter into any new covenant, contract, or agreement, except in the cases thereafter mentioned for demising or leasing any such lands, tenements, or hereditaments, or any part thereof for any term exceeding *thirty-one years* from the time when such

(y) 1 Ann. st. 1, c. 7. ss. 5, 6.

7 G. IV. c. 77, and 9 G. 4, c. 70.

(z) See 53 G. III. c. 121, s. 34.

(a) See 94.

lease shall be made, or if made in pursuance of a previous agreement then from the time when such agreement shall have been entered into, and in every lease which the said council is not thereby restrained from making, there shall (except in the cases thereafter mentioned,) be reserved and made payable during the whole of the term thereby granted, such clear yearly rent as to the council shall appear reasonable, without taking any fine for the same: Provided, nevertheless, that in every case in which such council shall deem it expedient to sell and alienate, or to demise and lease for a longer term than thirty-one years, or upon different terms and conditions than those thereinbefore mentioned, any of the said lands, tenements, or hereditaments, it shall be lawful for such council to represent the circumstances of the case to the lords' commissioners of the treasury; and it shall be lawful for such council with the approbation of the said lords' commissioners, or any three of them, to sell, alienate, and *demise* any of the lands, tenements, and hereditaments of the said body corporate in such manner, and on such terms and conditions as shall have been approved by the said lords' commissioners: Provided always, that notice of the intention of the council to make such application as aforesaid, shall be fixed on the outer door of the town hall, or in some public and conspicuous place within the borough one calendar month, at least, before such application, and a copy of the memorial intended to be sent to the said lords' commissioners, shall be kept in the town clerk's office during such calendar month, and be freely open to the inspection of every burgess at all reasonable hours during the same.

In reference to this section, it may be sufficient to remark, that care must be taken to comply with all the requisites of the statute in respect of the notice to be given prior to the application to the treasury.

The statute further provides, (*b*) that in all cases in which

(*b*) Sec. 95.

any body corporate shall, on the 5th day of June, 1835, have been bound or engaged by any covenant or agreement, express or implied, or have been enjoined by any deed, will, or other document, or have been sanctioned or warranted by ancient usage, or by custom, or practice, to make any *renewal* of any lease for years or for life, or lives, or for years determinable with any life or lives, at any fixed or determinate, or known or accustomed period, or after the lapse of any number of years, or on the dropping of any life or lives, and years determinable after the lapse of any number of years at a fine certain, or under any special or specific terms or conditions, and also in all cases in which any body corporate shall theretofore have ordinarily made renewal of any lease for years, or for life or lives, or for years determinable with any life or lives, at any fixed or determinate, or known or accustomed period, or after the lapse of any number of years, or upon the dropping of any life or lives upon the payment of an arbitrary fine, it shall be lawful for the council of such borough to renew such lease for such term or number of years, either absolutely or determinable with any life or lives, or for such life or lives, and at such rent, and upon the payment of such fine or premium either certain or arbitrary, and with or without any covenant for the future renewal thereof, as such body corporate could or might have done in case that act had not been passed. And further, (c) that in any of the instances thereafter mentioned, it shall be lawful for the council, from time to time, to demise and lease, or to enter into any contract or agreement for demising and leasing any of the said lands, tenements, or hereditaments to any person, body politic, corporate, or collegiate, for any term not exceeding seventy-five years from the time of making such lease or agreement, (that is to say) of tenements or hereditaments, the greater part of the yearly value of which shall, at the time of making the lease or agreement consist of any building or buildings, of land or ground proper for

the erection of any houses or other buildings thereupon, with or without gardens, yards, curtilages, or other appurtenances to be used therewith, and where the lessee or intended lessee, shall covenant or agree to erect a building or buildings thereon, of greater yearly value than such land or ground, of land or ground proper for gardens, yards, curtilages, or other appurtenances to be used with any other house, or other building erected, or to be erected on any such ground belonging either to such body corporate, or to any other proprietor, or proper for any other purpose calculated to afford convenience or accommodation to the occupiers of any such house or building.

Several statutes, known as the *enabling and disabling* statutes, have at different times been passed for the regulation of leases granted by ecclesiastical corporations and others. But before proceeding to the consideration of these statutes, it may be advisable to direct the reader's attention to some acts recently passed, which, have for the present, placed restrictions on leases by ecclesiastical persons, with a view to an ulterior alteration of the law on this subject.

Enabling and disabling statutes.

By an act of the 6 & 7th years of Wm. IV. c. 20, entitled "an act for imposing certain restrictions on the renewal of leases by ecclesiastical persons." After reciting that it was expedient that such provision as was thereafter contained should be made respecting the granting of ecclesiastical leases it is enacted, That after the passing of that act no archbishop or bishop, ecclesiastical corporation, sole or aggregate, dignitary, canon, or prebendary, or other spiritual person, nor any master or guardian of any hospital, shall grant any new lease of any house, land, tithes, or other hereditaments, parcel of the possessions of his or their see, chapter, dignity, canonry, prebend, benefice, or hospital, *by way of renewal* of any lease, which shall have been previously granted of the same for two or more lives, until one

Statute of 6 & 7 Wm. 4, c. 20, restrictions on renewals.

or more of the persons, for whose lives such lease shall have been so made, shall die, and then only for the surviving lives or life and for such new life or lives, as together with the life or lives of such survivor or survivors shall make up the number of lives, not exceeding three in the whole, for which such lease shall have been so made as aforesaid; and that where any such lease shall have been granted for forty years, no such archbishop, &c., shall grant any new lease by way of renewal of the same, until *fourteen years* of such lease shall have expired, and that where any such lease shall have been made as aforesaid for thirty years, no such archbishop, &c., shall grant any new lease by way of renewal of the same, until *ten years* of such lease shall have expired, and where any such lease shall have been granted for twenty-one years, no such archbishop, &c., shall grant any new lease by way of renewal of the same, or (in the case of archbishops or bishops) concurrently therewith, until *seven years* of such lease shall have expired, and that where any such lease shall have been granted for years, no such archbishop, &c., shall grant any lease by way of renewal of the same, or otherwise for any life or lives, any law, statute, or custom to the contrary notwithstanding.

And further, That when any archbishop, bishop, ecclesiastical corporation, sole or aggregate, dignitary, canon, prebendary, spiritual person, master or guardian, shall thereafter grant any renewed lease of any house, land, tithes, or other hereditaments, parcel of the possessions of his or their see, chapter, dignitary, canonry, prebend, benefice, or hospital, such lease shall contain *a recital (d)* or statement, in the case of a lease for lives, setting forth the names of the several persons named as *cestui que vie* in the then last preceding lease of the same premises, and stating which of such persons, if any, is or are then dead,—or for whose life that of some other person has been exchanged by virtue of the proviso

(d) As to this, see Act of Parliament, 6 & 7 Wm. 4, c. 64. *Infra*.

thereinafter contained, and in case of a lease for years, setting forth for what term of years, the last preceding lease of the same premises was granted, and how much of such term had then expired, and how much remained to come and unexpired, every such recital or statement shall, so far as relates to the validity of the lease so to be granted, as aforesaid, be deemed and be taken to be conclusive evidence of the truth of the matter so recited or stated.

And further, that if any person shall execute any such lease or any counterpart thereof, knowing such recital or statement, or any part thereof to be false, or shall wilfully introduce or cause to be introduced, or aid or assist in introducing any such recital or statement into any such lease, knowing the same or any part thereof to be false, or shall prepare or ingross, or cause to be prepared or ingrossed, any lease or counterpart of a lease containing any such false recital or statement as aforesaid, knowing the same or any part thereof to be false, every person so offending shall be deemed and taken to be guilty of a *misdemeanor*, and every person so offending, shall, in addition to any punishment to which he may be liable, forfeit and pay to any person, suing for the same, the full sum of £500, or at the option of such person, five years' improved annual value of the hereditaments comprised in such lease.

But it is provided, that in cases where it shall be certified in manner thereafter mentioned, that for ten years then last past, it had been the usual practice (such practice having in the case of a corporation sole commenced prior to the time of the person for the time being representing such corporation,) to renew such leases for forty, thirty, or twenty-one years respectively at shorter periods than fourteen, ten, or seven years respectively, nothing therein contained shall prevent any archbishop, bishop, ecclesiastical corporation, sole or aggregate, dignitary, canon, prebendary, spiritual person, master or guardian, from granting a renewed lease,

conformably to such usual practice, provided that such usual practice shall be made to appear to the satisfaction of the archbishop of the province, in the case of a lease granted by such archbishop, or by a bishop, and in the case of a lease granted by any other corporation or person, to the satisfaction of such archbishop, *and also* of the bishop, having jurisdiction over such corporation or person, and shall, before the granting of such lease, be certified in writing, under the hand of the archbishop in the one case, and of the archbishop and bishop in the other case; the certificate so signed by an archbishop only, to be afterwards deposited in the registry of such archbishop, and the certificate so signed by an archbishop and also by a bishop, to be afterwards deposited in the registry of such bishop, which certificate shall be conclusive evidence of the facts thereby certified.

And it is further provided, that nothing therein contained shall prevent any archbishop, bishop, ecclesiastical corporation, sole or aggregate, dignitary, canon, prebendary, spiritual person, master or guardian, *from exchanging* any life or lives in being, for which any lease shall have been granted as aforesaid, and accordingly granting any renewed lease, with a view to effectuate such exchange of a life or lives, provided that the same shall be approved of (in the case of an archbishop) by the Sovereign in council, or (in the case of a bishop) by the archbishop of the province, or (in the case of any inferior corporation or person) by the archbishop of the province and bishop of the diocese; such approbation, when required, to be given by the Sovereign in council, to be testified by the president of the council, certifying on the renewed lease to be granted as aforesaid such approbation, and in all other cases, to be testified by the person or persons, whose approval is thereby required, certifying on such renewed lease, his or their approbation of the same.

And further, that nothing in the said act contained shall prevent any grants or renewals of leases, which may have

been authorized by acts of parliament, specially relating to the particular estates demised by such leases.

And that nothing in the said act contained shall prevent a lease from being granted, with a view to confirm any title or otherwise, for the life or lives of the *same* person or persons, or for the lives or life of the survivors or survivor of them, or for the *same* term of years, and commencing at the *same* period, as the lease last granted for a life or lives, or a term of years respectively.

And further, that no lease, not authorized by the laws and statutes then in force, shall be rendered valid by anything in the said act contained.

And it is further enacted, that if any lease, contrary to the said act, shall have been granted since the first day of March, 1836, or shall be granted after the passing of the said act, every such lease shall be void to all intents and purposes whatsoever, provided that nothing in the said act contained shall be deemed or taken to affect any lease granted, or to be granted pursuant to any covenant or agreement entered into previously to the first day of March, 1836.

By another act, passed in the same session, (e) entitled "an act to explain and amend an act, passed in this present session of parliament, for imposing certain restrictions on the renewal of leases by ecclesiastical persons," after reciting that doubts had been entertained, whether leases granted since the said first day of March in the then year, or to be thereafter granted by any archbishop, bishop, ecclesiastical corporation, sole or aggregate, dignitary, canon, prebendary, spiritual person, master or guardian, and which did not contain such recital or statement as aforesaid, were not made absolutely void by the aforesaid enactment, and it was expedient that all such doubts should be removed; it is enacted,

Explanatory
act of 6 & 7
Wm. 4, c. 64.

that no lease granted, or to be thereafter granted, by any archbishop, bishop, ecclesiastical corporation, sole or aggregate, dignitary, canon, prebendary, spiritual person, master or guardian, shall be deemed or taken to be void under the provisions of the said act, *by reason only* of its not containing such recital or statement as therein mentioned, provided always that whenever any archbishop, bishop, ecclesiastical corporation, sole or aggregate, dignitary, canon, prebendary, spiritual person, master or guardian, shall thereafter grant any renewed lease of any manor, messuage, land, tithes, or hereditaments, parcel of the possessions of his or their see, chapter, dignity, canonry, prebend, benefice, or hospital, and such lease shall contain such recital or statement, as in the said act was mentioned; every such recital or statement shall so far as relates to the validity of the lease so to be granted, be deemed and taken to be conclusive evidence of the truth of the matter so recited.

Leases by ecclesiastical corporations sole at common law.

By the common law, ecclesiastical corporations *sole*, as bishops, deans, archdeacons, prebendaries, precentors, chancellors, parsons, and vicars, seised of lands and tenements in their corporate right, might, with the consent and confirmation of such persons as the law required, have made leases for lives or years, which would be good and binding upon their successors. (a)

Enabling statute of 32 Hen. 8, c. 28.

By the statute 32 Hen. VIII. c. 28, which is an enabling statute, all persons seised of lands in fee simple in right of their churches, (*with the exception of parsons and vicars,*) are allowed to make leases *by deed indented* for three lives, or one and twenty years, without the confirmation of any person whatever; provided they conform to certain provisions, which are the same as those imposed upon the leases of tenant in tail made pursuant to that statute. (b)

Leases by ecclesiastical corporations aggregate at common law.

All ecclesiastical corporations *aggregate*, were competent

(a) Co. Lit. 44. a.

(b) *Vide supra*, page 28.

at common law to make what leases they thought fit, without the confirmation of any person. (c)

And in like manner eleemosynary corporations, as masters and fellows of colleges, masters of hospitals and their brethren, had the power of leasing their lands for as long a period as they pleased. (d)

And eleemosynary corporations at common law.

The inconveniences attending such power, and the frequent impoverishment of the successors by its abuse, have given rise to various enactments of the legislature, being the disabling statutes, whereby restraint is imposed upon the leases of three classes of persons.

First in order is the statute 1 Elizabeth, c. 19, which applies solely to archbishops and bishops; by the fifth section of which all leases of archbishops or bishops (whether confirmed or not) of lands, holden in their corporate right, for more than three lives, or twenty-one years, to begin from the making thereof, or for less than the old accustomed yearly rent, are made absolutely void; excepting such leases as are made to the crown: an exception which is removed by the statute 1 James I. c. 3, by which *all* grants, leases and conveyances of church possessions, made by archbishops or bishops to the crown, are declared to be absolutely void. (e)

Restraining statutes 1 Eliz. c. 19, on archbishops and bishops.

The stat. 13 Elizabeth, c. 10, imposes the above mentioned restriction of the statute 1 Elizabeth upon all spiritual corporations, whether sole or aggregate, and also upon all eleemosynary corporations; who are thereby prohibited from demiseing any of their corporate possessions for longer than twenty-one years, or three lives; or for less than the old accustomed rent. By this statute all leases not conformable

13 Eliz. c. 10.

(c) Co. Lit. 44. a.

in the enabling and disabling statutes.

(d) *Ibid.*

(e) Copyhold lands are not with-

to its provisions are declared to be *absolutely void*. It has, however, been frequently held that such leases are good during the life of the lessor, (*f*) and even after the lessor's death they are not void, but only voidable, and may be confirmed by his successor. (*g*) But by the statute 14 Elizabeth, c. 11, s. 17. 19, the restraint of this last statute is removed from such houses with appurtenant grounds of spiritual and eleemosynary corporations as may be situate and lying within cities, boroughs, towns corporate, or market towns; and such houses and grounds may be leased for the term of forty years; provided, 1. that such house be not the capital mansion-house of such spiritual person, and that the ground to be let therewith do not exceed ten acres; 2. that the lease be made in possession, and not in reversion; 3. that not less than the accustomed yearly rent be reserved; and, 4. that the lessee be charged with reparations. This statute being only intended to alter the restrictions laid on by the statute 13 Eliz. does not extend to archbishops and bishops within 1 Eliz.

18 Eliz. c. 11. The statute 18 Eliz. c. 11, which did not affect the first Eliz. (*h*) reciting the restraining act of the 13 Eliz. and that the estates of spiritual persons had been demised by leases, made to begin long before former leases of the same lands had expired, enacts that all leases, made where the former lease shall not expire or be surrendered within three years from the making of the new one, shall be absolutely void; as well as all bonds and covenants for the renewal of the same. And by 43 Eliz. c. 9, s. 8, all judgments had for the intent to have and enjoy any lease contrary to these statutes shall be void in the same manner as bonds and covenants are appointed to be.

(*f*) Per Bayley, J., in *Doe dem. Bryan v. Banks*, 4 B. & A. 407.

(*g*) Per Holroyd, J., in *Edwards v. Dick*, 4 B. & A. 217.

(*h*) This statute gives licence to the president and scholars of St.

John Baptist college to let the manor of Fifield, in Oxfordshire, to the kindred of their founder, Sir T. White, for ninety-nine years, ss. 5, 6.

The power of leasing lands belonging to hospitals, and houses for the poor, is further restrained by the stat. 39 Eliz. c. 5, s. 2, which enacts, that all leases, grants, conveyances, or estates, made by any corporations so to be founded, exceeding the number of twenty-one years, and that in possession, and whereupon the accustomable yearly rent or more, by the greater part of twenty years next before the making of such lease, shall not be reserved, and yearly payable, shall be void. (i)

39 Eliz. c. 5,
further restrain-
ing leases of
hospital lands.

By statute 39 & 40 Geo. III. c. 41, it is enacted, that where any part of the possessions of any archbishop, bishop, master and fellows, dean and chapter, master or guardian of any hospital, or any other person or persons, or body or bodies politic or corporate, having any ecclesiastical living, shall be demised by several leases which was formerly demised by one lease under one rent; or where a part shall be demised for less than the ancient rent, and the residue shall be retained in the possession of the lessor; the several rents reserved on the separate demises of the specific parts shall be taken to be the ancient rents within the meaning of the statutes 32 Hen. VIII. c. 28; 1 Eliz. c. 19; 13 Eliz. c. 10; and 14 Eliz. c. 11.

39 & 40 Geo.
III. c. 41, for
apportioning
rents in bi-
shops, &c.
leases.

But that “no demise made before the passing of the act shall be valid, unless the several rents reserved upon the separate demises of separate parts of tenements accustomably demised under one lease, or if part be reserved in the possession of the lessor or lessors unless the rent reserved on the parts demised, shall be at least so far equal to the whole amount of the ancient rent or rents, that the part not demised shall be sufficient to answer the difference.”

By section 3: it is declared, that “where the whole of such premises shall in future be demised in parts, the aggregate

(i) The grants of ancient offices belonging to ecclesiastical persons are not within any of these acts; and therefore stand as at common law. Bishop of Salisbury’s case, 10 Rep. 61. a.

rents reserved shall not be less than the old accustomed rent; and so on in proportion, where a part shall be retained in possession by the lessor."

By subsequent sections, it is provided, that "no greater proportion of the accustomed rent shall be reserved by any separate lease than the part of the premises demised will bear."

And "where any specific thing shall have been reserved by the lessor, it may be charged on a competent part of the premises; and in case such provision shall have been made for payment of any sum of money, stipend, &c. it shall be deemed lawful if the lands, &c. charged be of greater annual value, exclusive of the rent reserved."

And "no lease shall be confirmed whereon no annual rent is reserved to the lessors," &c.

Section 7 provides, that "the act shall not authorize the reservation of any rent, on any such lease, made by any master, &c. of any college, in any other manner than is required by the statute 18 Eliz. c. 6."

By sections 8 and 9: it is provided, that "where payments have been reserved to vicars, curates, schoolmasters, and other persons than the lessor, provision shall be made in leases for the future payment thereof out of premises of three times the annual value, exclusive of the rent; except such payment depends only on the will of the person granting or renewing the lease."

By section 10: "persons holding such leases in trust, or granting under-leases of specific parts under covenants of renewal, may surrender them, in order that separate leases may be granted by the original lessors to the *cestui que trusts*, and under-lessees, on reasonable terms, subject to the accustomed rent, &c. and every such surrender, and the new leases granted thereupon, shall be good in law and equity, notwithstanding such under-lessees and *cestui que*

trusts may be infants, issue unborn, &c., or other incapacitated to act for themselves; provided such new leases be for their benefit, and such be expressly declared in the body of each lease."

In addition to these enactments, which apply generally to leases of ecclesiastical possessions, there are others which only affect *particular* corporations.

Particular corporations further restrained by statutes.

For by the statute 18 Eliz. c. 6, it is enacted, that no leases for lives or years shall be made by any of the colleges in the universities of *Cambridge* or *Oxford*, or by the colleges of *Winchester* or *Eton*, unless one-third of the old rent be reserved in wheat or malt; reserving a quarter of wheat for every 6s. 8d., or a quarter of malt for every 5s., and for default thereof in ready money after the rate of the best wheat and malt in the markets of *Cambridge*, *Oxford*, *Winchester* and *Windsor*, the next market day before the rent becomes due. And all leases, collateral bonds, and assurances, made to the contrary, are declared to be void. (*k*)

18 Eliz. c. 6. Leases by universities, &c.

And by section 61 of the statute of 22 Cha. II. c. 11, (passed soon after the great fire of London), the dean and chapter of St. Paul's are enabled to make a lease of *Newgate* market, and the churchyard wall, to the city of London, from forty years to forty years for ever. (*l*)

22 Cha. II. c. 11. Dean and chapter of St. Paul's.

From all which statutes the law must now be taken to be, that ecclesiastical corporations sole and aggregate, and elee-

The general result of these statutes, in respect of

(*k*) The rights of Magdalen college, Oxford, to lease a barn called *Momckes* barn in *Sussex*, and of St. John's Oxford, to lease their manors of *Fyfield*, *Oxfordshire*, to any heir male of their founder, are saved by sections 2 and 3. See Mr. Justice Blackstone's observations on the advantages derived to

colleges from this statute, 2 Bl. Com. 322.

(*l*) By the same statute s. 75, parsons and vicars of churches destroyed by the fire, with the consent of their patrons and the ordinary, were empowered to let their glebe land on building leases for any term not exceeding forty years.

mosynary corporations, have the power of demising their lands, subject to the regulations of the above statutes.

1. leases by
ecclesiastical
corporations
sole.

And, 1. Archbishops, bishops, and other spiritual persons, seised of lands in fee-simple in right of their churches, (excepting parsons and vicars), may make leases of such lands for twenty-one years, or three lives, without the confirmation of any other person, provided they follow the provisions of the statute 32 Hen. VIII. c. 28.

But where archbishops and bishops do not follow the provisions of the statute 32 Hen. VIII. c. 28, then they may make leases for twenty-one years, or three lives, *but for no longer period, with the confirmation of their deans and chapters*, so that they pursue the provisions of the statute 1 Eliz. c. 19.

All other ecclesiastical corporations sole, *including parsons and vicars*, may make leases *with confirmation* for the like period, following the provisions of the statutes 1 Eliz. c. 19; 13 Eliz. c. 10; and 18 Eliz. c. 11. But for no longer period can they lease their church lands; excepting houses in cities and towns, with not more than ten acres of ground, which they may lease for forty years, according to the provisions of the statute 14 Eliz. c. 11, ss. 17 and 19; (*m*) a licence which does not extend to archbishops and bishops; because they are not restrained by the statute 13 Eliz., and the statute 14 Eliz. is declared only to apply to persons restrained by that statute.

The 13 Eliz., 14 Eliz., and 18 Eliz. are to be read together, as forming one law, and it must be held, that when leases or houses, which are exempted out of the 13 Eliz., by the next statute (the 14 Eliz.) do not observe the provisions of the 18 Eliz., they fall within the enactment of the 13 Eliz., and are made void thereby; or in other words, a lease

(*m*) *Crane v. Taylor*, Hob. 269.

not warranted by the 14 Eliz. remains restricted by the 13 Eliz., which makes leases against that act void, unless sanctioned by the 18 Eliz.; thus, a lease (n) by a vicar, confirmed by the patron and ordinary, of messuages in the city of London, of which the dwelling-house of the vicar formed no part, and the ground demised was less than ten acres (being within the terms of the 14 Eliz.), granted for twenty-one years from the date of the lease, at a time when a former lease of the same premises granted for forty years, under the 14 Eliz. was in being, but within three years of its expiration was held not void under any of the restraining acts of Elizabeth,—that is, it was not within the 14 of Eliz., and was in compliance with the 13 of Eliz., and not contrary to the 18 of Eliz.

In order, however, to make the leases of bishops and others of the clergy binding upon the successors, it is necessary that the lessor should have been regularly inducted into the benefice, in right of which his lease is to be made. For if a man appointed to a bishoprick be not ordained and consecrated (as, it is said, was frequently the case in the reign of Edward VI.) his leases, *though confirmed by the dean and chapter*, will not bind his successors. (o) And, in like manner, it is necessary that the parson or vicar making a lease should have been regularly instituted and inducted into his benefice in order to bind his successor.—But it seems to be quite sufficient that he should be parson *de facto*; and that any defect in his title or his institution and induction will not affect his leases. Therefore, it is no ground to avoid a lease *properly confirmed*, that he was under age when he made the lease; provided he have been regularly admitted to the benefice; his non-age being immaterial for the acts he does in his corporate capacity. (p) Neither will the circumstance of his being a *layman*, and

Ecclesiastical lessors must have been duly inducted.

(n) *Vivian v. Blomberg*, 3 Bing. N. S. 311. 7 Sim. 548. Bickley, Plowd. 528.
 (o) Bro. Abr. *Leases*, pl. 68. (p) Bro. Abr. *Age*, pl. 80. Bac. Abr. *Leases*, (F).
 Bac. Abr. *Leases*, (F). Hare v.

not a *priest*, avoid the lease, (even though he be afterwards deprived on that account,) provided he have been regularly instituted and inducted, and the lease be properly confirmed. (*q*) And by the stat. 1 William and Mary, c. 16, s. 3, a lease by a beneficed person shall not be avoided merely on account of his having been simoniacally presented;—provided such lease be granted *bond fide* for a valuable consideration, and without the lessee's knowledge of the simony.

But where the church is full, and another parson is instituted and inducted to the same church, and the latter makes a lease, which is properly confirmed, still the lease will be void ; for the lessor was not the real parson. (*r*)

Upon the accession of Queen Mary to the throne of England, *John Bale*, who, in the reign of king Edward VI. had been consecrated bishop of *Ossory*, retired into *Germany*, to avoid the persecution of the reigning queen, on account of his having been a zealous opposer of Popery. The queen, treating this secession as an avoidance of his bishoprick, though *Bale* had never been deprived, sent her *cong   d'elire* to the dean and chapter in favour of one *Tannery*, who was thereupon consecrated bishop.—Upon the death of Mary, *Bale* returned from *Germany*, and three years afterwards died. After his death, *Tannery* made a lease for one hundred years, (which was confirmed by the dean and chapter,) and died. Upon his death, a new bishop having been appointed and consecrated, an *ejectione firm  * was brought against *Tannery's* lessee by the successor, on the ground that, as *Tannery* had been consecrated in the lifetime of the real bishop, who had never been deprived, the lease was void. , The case having been argued in the *King's Bench* in *Ireland*, judgment was thereupon given by two judges against the chief justice ; and this judgment was afterwards, upon writ of error, affirmed by the unanimous

(*q*) *Costard v. Winder*, Cro. Eliz. Comb, 202.
 775. S. C. Moore, 606. 1 Rol. (r) Year book, 9 Hen. VI. 34. a.
 Abr. 476. l. 45. Dr. Harscot's case, 1 Rol. Abr. 477. l. 3.

opinion of the court of *King's Bench* in *England*; and it was there resolved that, though the judicial and ministerial acts of *Tannery* would have been good, yet he could not be considered the lawful bishop, so as to bind his successor by his leases. (s)

By the Land Tax Redemption Act, 42 Geo. III. c. 116, it is provided, (t) that when the land tax shall be redeemed by any bishop, or other ecclesiastical corporation, with monies raised for such purpose, by virtue of any of the powers or provisions of the act; such land tax shall be considered as *yearly rent* payable to such bishop and his successors, over and above the reserved rent, (if any,) during the demise existing at time of such sale, and shall be recovered and paid as such, and the land tax so redeemed, shall in *all future demises* of such lands, be added to the ancient and accustomed yearly rent reserved; and be made payable during the term granted by such demises, and shall be reserved and made payable as such accustomed yearly rent during the term to be granted as aforesaid, and shall be recoverable as such accustomed rent, by the like remedies as such bishops or other ecclesiastical corporations may use for the recovery of the ancient and accustomed rent reserved upon such demises.

On this act it has been determined that such redeemed land tax must be *expressly reserved*, in addition to the ancient and accustomed rent; and that a lease in which such express reservation was not contained was voidable by the successor, although such land tax had been regularly paid to the bishop who granted the lease. (u)

(s) Bishop of Ossory's case, Palm. 22. S. C. called O'Brian v. Knivan, Cro. Jac. 552. S. C. called Sobrean v. Kevan, 2 Rol. Rep. 101. 130. According to the report in *Croke*, the lease was made in *Bale's* life; but this seems immaterial, the question having been argued with reference to the validity of *Tan-*

nery's consecration.—It was also contended, on the part of the lessee, that *Bale's* consecration had been irregular; and that therefore, when *Tannery* was appointed, there was no lawful bishop of *Ossory*.

(t) Sec. 69, 83, 88.

(u) Doe dem. Murray v. Bridges, 1 B. & Ad. 847.

In making a sale of lands for the purpose of such redemption, the bishop, or other ecclesiastical corporation must not sell the reversion only, but also the rents and services of the land, and they will not be entitled to distrain until the precise quantity of land, and the portion of reserved rent to be sold, be ascertained by the commissioners. (v)

2. Leases by ecclesiastical corporations aggregate and eleemosynary corporations.

2. Ecclesiastical corporations aggregate, as deans and chapters, and eleemosynary corporations, and heads and fellows of colleges, need no confirmation of their leases. The enabling statute has, therefore, no application to them. But the statute 13 Eliz. c. 10, and 18 Eliz. c. 11, (and, as to hospitals and houses for the poor, the statute 39 Eliz. c. 5,) lay the like restraint upon them as upon sole corporations; which restraint is also relaxed in their favour in respect of houses in cities and towns by the statute 14 Eliz. c. 11.

Thus much as to the persons enabled or restrained. But as all these leases, whether made with or without confirmation, must strictly follow the conditions imposed by the statutes, it will be hereafter necessary to consider at large how such leases must be made, so as to render them valid under the statutory provisions, as also who are the persons necessary to their confirmation. For the present, it will be sufficient to add, that whereas formerly the leases of the clergy were liable by several statutes (w) to become void by the non-residence of the lessor upon his benefice; this was abolished by the statute 43 Geo. III. c. 81; but by section 84 of the same statute continued by the 59th section of the 1 & 2 Vict. c. 106, it is provided, that any agreement made for the letting of the house of residence, or the buildings, gardens, orchards, or appurtenances necessary for the convenient occupation of the same, belonging to any benefice, to which house of residence any spiritual person may be required, by order of the bishop, to proceed and reside therein, or which may be

(v) *Warner v. Potchett*, 3 B. and Ad. 921.

(w) 13 Eliz. c. 20. 14 Eliz. c. 11. 18 Eliz. c. 11, and 43 Eliz. c. 9.

assigned or appointed as a residence to any curate by the bishop shall be made in writing, and shall contain a condition for avoiding the same upon a copy of such order, assignment, or appointment being served upon the occupier thereof, or left at the house, and otherwise shall be null and void, and a copy of every such order, assignment, or appointment shall immediately, on the issuing thereof, be transmitted to one of the churchwardens of the parish, or such other person as the bishop shall think fit, and be by him forthwith served on the occupier of such house of residence, or left at the same; and any person continuing to hold any such house of residence, or any such building, garden, orchard, or appurtenances, after the day on which such spiritual person shall be directed by such order to reside in such house of residence, or which shall be specified in any such order, assignment, or appointment, and after such copy shall be so served or left as aforesaid shall forfeit the sum of 40s. for every day he shall, without the permission of the bishop in writing, under his hand for that purpose obtained, wilfully continue to hold any such house, building, garden, orchard, or appurtenances, together with the expence of serving or leaving such order, assignment, or appointment to be allowed by the bishop issuing the order, or making such assignment or appointment, and it shall also be lawful for the spiritual person so directed to reside, or the curate to whom any such residence shall be assigned, to apply to any justice of the peace having jurisdiction in the place, for a warrant for the taking possession thereof, and the justice to whom any such order for such possession is produced shall, and by the act he is required, upon its being duly verified, to grant a warrant to some peace officer to deliver such possession, and possession may thereupon be taken of such house under such warrant, at any time in the daytime, by entering the same by force, if necessary, without any other proceeding by ejectment or otherwise, any law or statute to the contrary notwithstanding. Provided that any person who shall have been in possession of any such house of residence or premises under a verbal agreement only, or under any agreement in which the condition

aforesaid for avoiding the same shall not be inserted, and who shall be turned out of possession by virtue of that act, shall be entitled to sue the person with whom he or she had entered into such agreement for damages occasioned by his or her being so turned out of possession, to be recovered in any of her majesty's superior courts at Westminster.

The Statute 59 Geo. III. c. 12, s. 17, vests in the churchwardens *and overseers* of the poor, in the nature of a body corporate, all buildings, lands, and hereditaments, belonging to the parish. Under this statute neither the churchwardens alone, (x) nor the overseers alone, can make valid leases of such lands, (y) but they must all join.

Of leases by
civil corporations.

Prior to the 5 & 6 Wm. IV. c. 76, on *civil* corporations, as mayor and commonalty, bailiffs, burgesses, and the like, no restraint was imposed by common law or statute. Consistently, therefore, with their particular bye-laws, they might lease their lands either for life or years, and their successors would be bound by such leases; (z) but it has been already shewn that by the Municipal Corporation Act, these bodies are now restricted in their power of granting leases. (a)

Corporations
cannot make
leases to
themselves or
their own
members.

With regard to all corporations, it is to be remarked, that a *corporation sole* cannot in its corporate capacity make a lease to itself in its natural capacity; because it is in point of fact the same person. On the same principle, a corporation aggregate cannot make a lease to one of its component parts. Where, therefore, there is a corporation composed of dean and chapter, the dean cannot make a lease to the chapter, nor the chapter to the dean; though a lease may be made to any of the *prebendaries*, for they do not form an integral part of the body corporate. (b) So, where a

(x) *Philips v. Pearce*, 5 B. and C. 433. 8 D. and R. 83. 162.

(y) *Woodcock v. Gibson*, 4 B. and C. 462. *supra*, p. 38.

(z) *Smith v. Barret*, 1 Sid. 161. 303.

(a) See 5 & 6 Wm. IV. c. 76, *et*

(b) *Salter v. Grosvenor*, 8 Mod.

civil corporation is composed of two bailiffs and burgesses, one bailiff with the burgesses cannot make a lease to the other bailiff in his natural capacity. (c)

By the statute 12 Cha. II. c. 36, (confirmed by the statute 13 Cha. II. c. 14,) the Master of the Rolls is empowered to make leases of tenements vested in him by virtue of his office for forty-one years, under certain restrictions; (d) he may grant concurrent leases during the last seven years of a former lease, and may, at any time accept a surrender, and grant a new lease for twenty-one years.

Of leases by the Master of the Rolls.

By 6 & 7 Wm. IV. c. 49, he was authorized to grant a lease with the approbation of three of the lords of the treasury of part of the Rolls' estate, at a pepper corn rent, to the society of judges and sergeants at law, for a term not exceeding ninety-nine years, for the erection of commodious chambers for the use of the judges for judicial purposes, with convenient avenues and approaches from Sergeant's Inn.

A custom for a lord of the manor to grant leases of the wastes without restriction is bad in law, (e) but by the statute 13 Geo. III. c. 81, s. 15, the lords of manors, with the consent of three-fourths of the commoners, may make leases of any part not exceeding one-twelfth of the wastes and commons within the manor, for any term not exceeding four years, at the best improved rent that can be got by public auction; the rent to be applied in draining, fencing, and improving the residue of such wastes and commons.

Of leases by the lords of manors.

Husband and wife are jointly seised of the freehold of the wife in her right, and in pleading the seisin during the coverture, it is held bad to plead that the husband is seised in his demesne, the pleading should be, that he and his wife were

Seisin by husband and wife of the wife's lands.

(c) *Salter v. Grosvenor*, 8 Mod. Bl. Rep. 617. S. C. Burr. 1975. 303.
 (d) *Vide Wilson v. Sir T. Sewell*, 153.
 (e) *Badger v. Ford*, 3 B. and A.

seised of and in, &c., in their demesne as of fee in right of the wife. (*f*)

Leases by husband and wife.

A lease by deed by husband and wife, although not made in pursuance of the statute of 32 Hen. 8, c. 28, is their joint demise and during coverture must be pleaded as such, (*g*) and after the husband's death the wife may affirm it by the acceptance of rent; (*h*) or if no rent is received, by acceptance of fealty or bringing an action of waste; (*i*) or she may avoid it by bringing trespass or ejectment in like manner as if she had been no party to it, and the same power of election and of affirming or annulling devolves on her issue or heir. (*k*) But until the disagreement to the lease by the wife, her issue or heir, the lease will be good. (*l*)

If by parol.

A parol lease by husband and wife of her freehold land, is, it seems, absolutely void on his death, and no acceptance of rent by her will affirm it, but the tenant may, by her acceptance of rent, it should seem, become tenant from year to year on the terms of the lease.

By husband alone of wife's lands.

To what extent a lease by the husband alone of the freehold land of his wife is valid, has been made a question. In *Bac. Ab.* it is said to be clearly agreed that such a lease is a good lease during the whole term, unless the wife, by some act after the husband's death shews her dissent therefrom. The proposition is questioned by Mr. Sergeant Williams, who cites *Bro. Acceptance*, 6, which certainly appears to support the doctrine, that the acceptance of rent by the wife, will not in such law affirm the lease.

The enabling statute of the 32 Hen. VIII., has to a great degree obviated this difficulty, by empowering a husband

(*f*) See *Took v. Glasscock*, 1 Wms. Eliz. 112.

Saund. 253. 2 Wms. Saund. 283.

(*g*) See 4 *Bac. Ab.* Vol. 4, p. 13.

(*h*) *Ibid.*

(*i*) *Jackson v. Mordaunt*, Cro.

(*k*) 1 *Roll. Ab.* 369. l. 8. 22, *et vide*

Doe dem. Collins v. Weller, 7 T. R. 478.

(*l*) *Ibid.*

seised of land in fee or in tail in right of his wife, or *jointly* with his wife, to make leases for one and twenty years, or three lives, *which will bind his wife and issue*. The provisions which regulate leases by tenants in tail and ecclesiastical persons, made under this statute, apply equally to the leases of a husband seised *jure uxoris*, or jointly with his wife. Referring, therefore, to these as already detailed, and to the more ample discussion hereafter to be made, I shall here merely mention such as apply exclusively to lands holden by the husband in right of his wife. (*m*)

1. The wife must be a party to the lease, and must execute it. (*n*)

2. The rent must be reserved to the husband and wife, and *the heirs of the wife*.

3. The statute further prohibits the husband from parting with the *rent* longer than during the coverture; (*o*) and directs that the rent shall after his death go to such person or persons, and their heirs, as the lands leased would have gone to in case no lease had been made. (*p*)

These latter provisions, however, only extend to leases of lands which the husband holds *in right of his wife*: for where he holds *jointly with his wife* his single demise will be good, and binding *upon the wife*. (*q*)

(*m*) *Vide supra*, p. 20. It was always held, even before the statute, that a lease by husband and wife must be by deed. See *post*.

(*n*) A lease made according to this statute is the lease both of husband and wife, and shall be pleaded as such. But where husband and wife make a lease in their own names, and give a power of attorney to A. to deliver it upon the land, it has been held that as a feme covert cannot make a power of attorney, this lease shall be

pleaded as the lease of the husband only, *Wilson v. Riche*, Yelv. 1. *Gardiner v. Norman*, Cro. Jac. 617.—But see the contrary held in *Cooper's case*, 2 Leon. 200. And — *v. Hopkins*, Cro. Car. 165.

(*o*) *Et vide* *Hill v. Saunders*, 4 B. and C. 529.

(*p*) *Smith v. Trinder*, Cro. Car. 22.

(*q*) Co. Lit. 46. b. 351. a. Anon. Poph. 5: and see Bac. Abr. *Bar. and Feme*, (C.) 2.

Nor does the statute affect terms for years, and mere chattel interests, not being mere choses in action, of which the husband is possessed in right of his wife; for of these he has the full disposal as long as he lives, and may not only make a lease of them to commence *in presenti*, but ever after his death. (r) And if he dispose of the term reserving rent, and die, the rent shall go to his executor, and not to his wife; (s) and in like manner if he assign the term upon condition and die, and the condition be broken by the assignee, his executor shall enter, and not his widow; for from her the term had entirely passed upon his disposal of it; though it might be otherwise, if the condition had been broken during his lifetime, and then he had entered and died; for as the disposition by such entry is defeated, the term appears to be *in statu quo*. (t)

So, where a woman is possessed of a term as executrix or administratrix, it is competent to her husband to dispose of it: (u) and where a term has been assigned in trust for a woman before her marriage without the privity of her husband, he may dispose of it; (v) though it would be otherwise, had the assignment been with his knowledge and consent. (w)

The husband may dispose of his wife's contingent, legal, or equitable interest in a term, (x) and he may release or extinguish it; (y) but of a mere possibility of a term of which his wife is possessed, which cannot possibly take effect in possession during his life, as if a lease be made to husband and wife for their lives, and afterwards to the executor of the survivor, the husband can make no lease to endure beyond each of their lives. (z)

(r) But he cannot devise it; for his devise does not take effect until his death, when his interest ceases, *ibid.*

(s) *Ibid.*

(t) *Ibid.*

(u) Throutout dem. Levick v. Coppin, Bl. Rep. 801. S. C. 3 Wils. 277. Arnold v. Bidgood, Cro. Jac.

318.

(v) Sir Edward Turner's case, 1 Vern. 7. Pitt v. Hunt, 1 Vern. 18.

(w) *Ibid.*

(x) Donne v. Hart, 2 Russ. and Myl. 364.

(y) Lampet's case, 10 Rep. 51. a.

(z) Co. Litt. 351. a. note 504, *et vide* Purdew v. Jackson, 1 Russ. 1. note.

Where a lease of the wife's lands is made by the husband, or by husband or wife, without following the provisions of the enabling statute, she may, as before observed, avoid it after her husband's death. But where husband and wife made a lease of the wife's lands by indenture for a term of years rendering rent, and the lessee entered; and the husband dying before the day of payment, the wife took a second husband, and he at the rent-day accepted rent and died: it was holden, that the wife could not avoid the lease, for by her second marriage she transferred her power of avoiding it to her husband; and his acceptance of the rent bound her, as her own before such marriage would have done: for he by the marriage succeeded into the power and place of his wife; and what she might have done, either as to affirming or avoiding such lease before marriage, the same may the husband do after the marriage. (x)

If a widow, who is guardian in socage of her son, marry again, and the husband and she join in a lease of the infant's lands, such lease is voidable upon the husband's death; for she had only an interest in right of the infant; (a) and, therefore, will not be bound by her joining with her husband, as she would have been in the case of her own possessions. (b)

Leases of lands held by wife as guardian.

III. Besides these persons who have a temporary interest in the lands to be demised, there is another class of persons who, being seised or possessed *jure alieno*, may make leases for the benefit of others.

III. Of leases by persons in *autre droit*.

Executors and administrators have an absolute power over the terms of the testator or intestate, and may either assign or lease them, the rent being assets in their hands. (c) The lease of one executor will be binding upon all the

By executors and administrators.

(x) Anon. Dyer. 159. a. pl. 36. and see Whetstone v. Wentworth, reported in a note to this case.

(a) *Infra*.

(b) Osborn v. Carden, Plowd. 293.

(c) Bac. Abr. *Leases*, (I.) 7.

others, (*d*) and if a term be specifically bequeathed to one of several executors for life, with remainder over, and a power of leasing for twenty-one years is given him, and he enters and makes a lease for forty-two years, reserving rent to himself, his executors, and administrators, neither his entry or sole lease reserving rent to himself, will be deemed an assent to his legacy, but the lease will take effect for the forty-two years out of his interest as an executor. (*e*) But nevertheless, if the will contains a specific bequest of the term, a party should be over cautious in accepting a lease from the executors, as they may have assented to the bequest. When an infant under the age of twenty-one is appointed executor, and a *general* administration is granted *durante minori ætate*, such administrator has as much power to make leases, until the executor be of age, as any other administrator. Such leases, however, will not be binding upon the executor when he has attained the age of twenty-one; for he may then enter and avoid the lease for the residue of the term demised. (*f*)

By guardians.

Independent of the authority given to guardian in socage by statute law, (*g*) he is considered as having himself such an interest in the infant's lands, that he may make leases in his own name which may be confirmed or avoided by the ward upon his coming of age. (*h*) And a testamentary guardian, or one appointed pursuant to the statute 12 Cha. II. c. 24, has the same office and interest as guardian in socage. (*i*)

But guardian by nurture can make no leases for years

(*d*) Doe dem. Hayes v. Sturges, 7 Taunt. 217. 2 Marsh. 505. Simpson v. Gutteridge, 1 Mad. Ch. Rep. 616.

(*e*) Doe dem. Hayes v. Sturges, *supra*.

(*f*) Sir Moyle Finch's case, 6 Rep. 68. *a.* and see Prince's case, 5 Rep. 30. The age was formerly seventeen, but now by stat. 38 Geo. III. c. 87, s. 6, administration

is to be granted to the infant executor's guardian until he attain twenty-one.

(*g*) *Vide* 43 Geo. III., c. 75. 1 Wm. IV. c. 65, *et supra*, p. 20.

(*h*) Shopland v. Ryoler, Cro. Jac. 55. 98. Brisden v. Hussey, 2 Rol. Abr. 41. l. 15.

(*i*) *Vide* Duke of Beaufort v. Berty, 1 P. W. 702. Roe dem. Parry v. Hodgson, 2 Wils. 129.

either in his own name or in the infant's; because he has merely the care of the person and education of the infant, and has nothing to do with the lands; and such guardian may exist, though the infant have no lands at all, which guardian in socage cannot. (i)

Assignees of bankrupts and insolvents (k) may grant leases under powers limited to the bankrupt or insolvent for the benefit of the estate. Assignees of bankrupts and insolvents.

A mere receiver of the estate of an infant cannot make leases without the express order of the Court of Chancery. Receivers of infants' estates.

By the statute 1 Wm. IV. c. 6, committees of lunatics are empowered, by direction of the lord chancellor, to accept surrenders and grant new leases, the fine for renewal being first paid, and by the like direction to execute powers of leasing vested in the lunatic and grant building, farming, and other leases of the lunatic's land. (l) Committees of lunatics.

Trustees of charities, who have the legal estate for the benefit of the charity, have full power to make such leases as may promote its interest. But the Court of Chancery, which has a special jurisdiction over charities, will always see that the lands are properly leased; and that the power of the trustees is not abused by the making of leases prejudicial to the interests of the charity, either by their length or inequality. It is of consequence that trustees should not only act *bonâ fide* in the distribution of trust property, but they should be prepared to show satisfactorily to the court they have done so; in which case Courts of Equity will endeavour to protect them from the consequence of mere indiscretion, especially after great length of time has elapsed, (m) Trustees of charities.

(i) *Bedell v. Constable*, Vaugh. 179. Vin. Abr. Vol. 14, p. 182.

(k) 6 Geo. IV. c. 16, s. 77. 7 Geo. IV. c. 57.

(l) *Vide* Sec. 19, 20, 23, and 24, and see also 43 Geo. III. c. 75, and

Drury v. Fitch, Hutton, 16. *Foster v. Merchant*, 1 Vern. 262. *Knipe v. Palmer*, 2 Wils. 130, and *Re Starkie*, 2 Russ. 197.

(m) *Attorney-General v. Warren*, 2 Swan. 305.

and trustees should never omit the precaution of having the lands surveyed by a competent surveyor before granting the lease.

Where the trustees of a charity granted a lease of lands theretofore let at 31*l. per annum*, for nine hundred and ninety-nine years, in consideration of 500*l.* to be laid out in improvements, and of 4*l. per annum* additional rent; the court considered this to be a sort of perpetuity destructive to the charity estate, and decreed that the lease should be given up: but, as the tenant had lately laid out 600*l.* in improvements, it was ordered that he should have just allowances made him in the account, which was directed. (*p*)

An alienation for ninety-nine years of a charity estate, if it be a *mere husbandry* lease and without consideration, is a lease which the Court of Chancery will not permit to stand, unless it be shewn that such lease is fair and reasonable, and actually beneficial to the charity. In 1747, the trustees of a charity demised to the ancestor of A. the defendant for ninety-nine years a certain farm, part of a charity estate, at a yearly rent of 32*l.*, with an agreement that within seven years 40*l.* should be laid out in repairs. The original lessee died in 1753; and in 1801 the existing trustees filed their bill against the defendant, his representative, charging collusion and breach of trust in the former trustees, and praying that the defendant might surrender his former lease and accept a new one; which they offered for a reasonable term, and at a proper rent: the defendant insisted, that although his lease was a mere husbandry lease, he had laid out 130*l.* in repairs and draining: the relators proved that the farm was worth to be let 130*l. per annum*.—The Lord Chancellor held, that this was a breach of trust in the first trustees, and that the lease ought to be delivered up; but his lordship would not charge the defendant with more rent than 32*l. per annum* previous to the filing of the bill, nor with costs, if he gave up

the lease without trouble: but in future, he said, such leases of charity lands would not be tolerated. The defendant undertook to give up his lease; and it was agreed that he should continue in possession to the end of the year, paying a rent. (q)

In a modern case it was determined that neither a lease of charity lands for ninety-nine years, as a *mere husbandry* lease, upon terms and at a rent adapted to a lease for twenty-one years, nor a building lease for nine hundred and ninety-nine years, upon an expenditure commensurate to a term of ninety years, would be supported. (r) But a lease for eighty years was supported as to the interest of the sub-lessee who had given a fair consideration, and had no notice, except that the estate belonged to a charity; for the court, while it protects the interests of the charity, will take care that innocent persons are not damnified. (s)

In order, however, to set aside the leases of charity lands, it must appear that the trustees have been guilty of a breach of trust in making, and that the lessee has made himself accessory to that breach of trust in accepting, such leases; for a lease for lives, or for a long term of years determinable upon lives, is not upon the face of it an abuse of trust; neither is it a ground for invalidating the lease that the mode of letting is not the best that might be prescribed; but it must be shewn, that the mode is so *positively bad*, that no persons meaning fairly to discharge their trust would have resorted to it. (t) If it be clearly proved, that charity estates are let at an undervalue, the leases will be set aside; but this must be satisfactorily made out, and the undervalue must be considerable: for it is not sufficient to shew that a

(q) Attorney-General v. Owen, 10 Ves. 555, *et vide* Attorney-General v. Hotham, 3 Russ. 415.

(r) Attorney-General v. Backhouse, 17 Ves. 283, 291.

(s) *Ibid.*

(t) *Per* Sir W. Grant, M. R. Attorney-General v. Cross, 3 Meriv.

539. And see Attorney-General v. Magwood, 18 Ves. 315. Attorney-General v. Brooke, *ibid.* 319. Attorney-General v. Wilson, *ibid.* 518. *Ex parte* Birkhamstead Free-school, 2 Ves. and Bea. 134. Attorney-General v. Hungerford, 8 Bligh, 437.

little more might have been got for the estate than has been actually reserved. Where, therefore, the lands of a charity had been leased for ninety-nine years determinable upon three lives, at a small rent upon the payment of a fine somewhat exceeding nine years' purchase: and it was attempted to set aside the leases upon the ground of their being granted for an improper length of time, and for an inadequate consideration; but no direct evidence was given of the under-value; and it appeared that the general usage of the country, as well as of the donor himself at the time of the gift, was to lease the lands in that manner; the court dismissed the information without costs. (*u*)

Where a lease is made in direct opposition to the bye-laws of a charity, the Court of Chancery will interpose; therefore, where the rules of a charitable foundation were, that no lease should be granted for more than twenty-one years, and a lease was granted for twenty-one years with a covenant by repeated renewals to make it up sixty years, the covenant for renewal was declared void in equity, as rendering the lease no less prejudicial than an actual lease for sixty years. (*v*)

And so, where the trustees joined in granting a long lease of the charity lands against the express directions of the founder, the court set it aside with costs, as an improper administration of a charity estate. (*w*)

(*u*) Attorney-General *v.* Cross, 3 Meriv. 524. And see Attorney-General *v.* Moses, 2 Mad. Ch. Rep. 294.

(*v*) Lydiatt *v.* Sir John Foach, 2 Vern. 410.

(*w*) Attorney-General *v.* Griffith, 13 Ves. 565.

CHAPTER THE FOURTH.

Of the Persons to whom demises may be made.

ALL persons are capable of becoming lessees of demisable property : in some cases, however, demises are liable to be avoided, in respect of the persons to whom they are made. Of leases made to

Infants may accept leases, and upon their arriving at full age may avoid them. (a) So, a *feme covert* may accept a lease, which may be avoided by her husband ; or by herself after her husband's death, even though he had assented to it. (b) Infants :
Femes covert :

By the statute 21 Hen. VIII. c. 13, spiritual persons were prohibited from taking to farm any manors or lands, &c., unless for the necessary maintenance of their family : but by the statute 43 Geo. III. c. 84, sections 4 and 5, (explained by the statute 43 Geo. III. c. 109,) it was made lawful for them to take to farm either for life, years, or at will, any messuage or dwelling house with or without orchards, gardens, or other appurtenances ; and for any spiritual person holding any benefice, and not having sufficient glebe or demesne lands annexed to such benefice, with the consent of the bishop of the diocese, to take to farm for a limited term of years any lands, tenements, or hereditaments. And by sections 7 and 8, of the same statute, vicars or curates might Ecclesiastical persons :

(a) Ketsey's case, Cro. Jac. 320.

(b) Co. Lit. 3. a.

take leases of the impropriate parsonages of their parishes; but unless such parsonage had been occupied by a spiritual person previously to the passing of that statute, the occupation must have been licensed by the bishop.

By the 57 Geo. III. c. 99, the 21 Hen. VIII. c. 13, was in part, and the 43 Geo. III. c. 84, and 43 Geo. III. c. 109, were wholly repealed, and it was enacted, that it should not be lawful for any spiritual person to take to farm for occupation by himself, any land *exceeding eighty* acres, for the purpose of using or cultivating the same, without the consent in writing of his bishop, which permission should specify the number of years not exceeding seven, for which the permission was given, and every person offending should forfeit forty shillings for every acre above the quantity of eighty acres for every year he should occupy such land. By the 1 & 2 Vict. c. 106, the 21 Hen. VIII. c. 13, and 57 Geo. III. c. 99, were wholly repealed, but by the 28th section the above provision, as to 57 Geo. III. c. 99, was re-enacted.

Felons and
outlaws:

Persons attainted of treason or felony, and persons outlawed in civil suits, may be lessees; but upon office found, the king will be entitled to their leases. (c)

Aliens,

So an alien may take a lease of a house, or of lands, meadows, pastures, &c.; but the estate thereby granted, upon office found, will, except as after mentioned, forthwith devolve to the crown. (d) It seems that marriage will not entitle an alien husband to a term vested in the wife. (e) If an alien friend be a *merchant*, he may securely take a lease of a house for carrying on his trade or merchandize; and the crown cannot seize such lease, unless he abandon the realm; (f) yet here,

merchants,

(c) Co. Lit. 2. b. Shep. Touch. 235.

land, Styles, 20. S. C. 1 Rol. Abr. 194. l. 34.

(d) *Ibid.* Calvin's case, 7 Rep. 49. 1 Rol. Abr. 194. l. 13. As to purchases by an alien in the name of a trustee, see *Rex v. Hol-*

(e) *Theobald v. Duffoy*, 9 Mod. 102, and 2 Vin. Ab. 260.

(f) Co. Lit. 2. b.

according to *Sir Edward Coke*, if he die, the lease shall go to the king, and not to his executors or administrators. (*g*)

By the statute 32 Hen. VIII. c. 16, s. 13, all leases of artificers: houses or shops to an alien, being an *artificer* or *handicraftsman*, are made void; a statute which still remains unrepealed, though it has been always strictly construed in favour of aliens; (*h*) and it has been expressly decided that a *vintner* is not within the meaning of the statute. (*i*)

But none of these disabilities apply to a *denizen*, who is *Denizens* as capable of being a lessee as a natural subject. (*k*)

(*g*) Co. Lit. 2. *b*. But see Anon. 1 And. 25, and Sir Upwell Caroon's case, Cro. Car. 8.

(*h*) *Vide* Jevens v. Harridge, 1 Saund. 5. S. C. 1 Sid. 308. Co.

Lit. 2. *b*. n. (7.)

(*i*) Bridgham v. Frontee, 3 Mod. 94.

(*k*) 1 Bl. Com. 374.

CHAPTER THE FIFTH.

Of the Form of demises.

THE relation of landlord and tenant may be created by lease, or by assignment.

How far tenant is a trustee for his landlord.

The tenant is so far a trustee of the lease for his landlord that the latter is entitled to an inspection, and to take a copy of it in cases where it appears that no counterpart can be found. (a)

Lessor not entitled to charge for counterpart.

Under an agreement that the lessor would, at the request and costs of the lessee, grant a lease, the lessor is not entitled to charge the tenant with the expense of a counterpart. (b)

Distinction between lease, underlease,

and assignment.

As a general proposition when the alienor parts with only a portion of his estate, reserving to himself a reversion, it is a *lease*. When a lessee for years disposes of his term reserving a reversion however small, as only one day, the transfer is called, with reference to the original lease, an *underlease*. (c) When he transfers his whole estate to the alienee, it amounts to, and is called, an assignment.

If lessee parts with the whole interest reserving a rent.

If the lessee grants away his whole interest, reserving a rent, it may, as between the parties, be supported as a demise or lease, on which an action for debt or assumpsit would lie, but, inasmuch as no reversion would remain in the alienor,

(a) Doe v. Slight, 1 Dowl. 163.

(b) Jennings v. Turner, 8 C. and P. 61.

(c) Crusoe dem. Blencowe v. Bugby, 3 Wils. 234. S. C. Bl. Rep. 766.

he would not be entitled to distrain without an express authority reserved by the deed. With this explanation, the different cases on the subject may be reconciled.

In one case, where the lessee conveyed his *whole* estate, reserving to himself the rent, with a power of re-entry for non-payment, it was held to be not an assignment, but an underlease, on which *debt for rent* might be maintained, although it could not be distrained for. (*d*) In a subsequent case, where a lessee for years granted the whole of the term to J. S., it was held in support of a plea of *non-tenuit*, that J. S. was the assignee of the term, although in the deed of assignment the rent was reserved to the assignor, with a power of re-entry for non-payment, and although new covenants were introduced. (*e*) In a still later case, where T. W., being possessed of a term, which was to expire on the 11th November, let the premises orally from the 11th September to the 11th November for 270*l.*, payable immediately, it was held, that having parted with the whole of his term, he was not entitled to distrain, still it was a lease of which parol evidence might be given, and not an assignment, which must have been in writing. (*f*)

In a recent case, in avowry for rent in arrear, it was pleaded, that by the demise in the avowry mentioned, the avowant demised and granted the premises to the plaintiff for all the residue of the avowant's term and interest therein, and that the avowant had not any reversionary interest, after the expiration of the term granted to the plaintiff in replevin. It was urged that there was a repugnancy in the plea, which admitted the tenure, but shewed an assignment. But the Court said they could not distinguish the case from *Preece v. Corrie*, and therefore, held the plea good. (*g*)

(*d*) *Poulteney v. Holmes*, Str. Webber, 8 Taunt. 593.

405, *et vide Baker v. Gosling*, 1 Bing. N. S. 19. (*f*) *Preece v. Corrie*, 5 Bing. 25.

(*e*) *Palmer v. Edwards*, Doug. N. S. 898.
187. n. [59.] *S. P. Parmenter v.*

(*g*) *Pascoe v. Pascoe*, 3 Bing.

If lessor grants a term exceeding his lease.

If a termor for years make a lease for a period *exceeding* his term, it will operate as an assignment;—as if a lessee for three years demise the premises for four years, he will not thereby gain any tortious reversion; but the demise will amount to an assignment. (*h*) But if a lessee *for lives* grant *all his estate and interest* to A. and his executors, this will not be an assignment; because a grant to a man and his executors cannot convey a freehold. (*i*)

The distinction between an assignment and a lease depends upon the quantity of interest which passes, and not upon the extent of the premises transferred. Where, therefore, the lessee of a house for seven years demises *part* of the house to another for the *whole* of his term, this is not an underlease, but an assignment *pro tanto*; and so, on the other hand, where the lessee of a house for seven years demises the whole of the house for seven years *all but one day*, this is an underlease and not an assignment. (*k*)

An assignment, therefore, creates no new estate; but transfers an existing estate into new hands: a lease, or underlease, creates a perfectly new estate. When a lease is made to commence before the expiration of a subsisting lease, it is called a *concurrent* lease; when made to commence after the determination of another lease, it is a lease *in reversion*, (*l*) or it may be a lease of the reversion, that is, a grant of the reversion carrying the rent.

The form of demises remains now to be considered:—1.

(*h*) Hicks v. Downing (*alias* Smith v. Baker,) Ld. Raym. 99. S. C. 1 Salk. 13.

(*i*) Earl of Derby v. Taylor, East, 502.

(*k*) Crusoe dem. Blencowe v. Bugby, *supra*.

(*l*) Winter v. Loveday, Com. Rep. 39. A bare right or chose in

action cannot in general be assigned at law. But where a lease is made with a bond conditioned for the performance of covenants, and the lessee assigns the lease, he may also assign the bond so as to give the assignee the benefit of it, provided it be *before* breach of covenant. Anon. Godb. 81.

Where the parties lie under no special directions as to the form and extent of the demise: 2. Where they lease under the enabling and disabling statutes: and 3. Where they lease under the directions of a power. (m)

SECTION I.

OF THE FORM OF ASSIGNMENTS AND LEASES IN GENERAL.

The distinction between things which lie in livery, and things which lie in grant, rendered a different mode of conveyance necessary in their alienation. Things lying in livery, as they were of a tangible nature, might be easily transferred from one hand to another: thus land might be passed by a symbolical delivery; and this being always made in the presence of witnesses, no other form or evidence was necessary to authenticate the transfer. But things lying in grant were incapable of this mode of conveyance: their abstract nature made it impossible for any formal possession to be transferred: and a deed was always necessary for their alienation, the delivery of which deed immediately passed the property, and therefore a demise by parol of a right of hunting and shooting, although together with a messuage, is void; but an action for use and occupation might be maintained, if the count or declaration be properly framed. (n)

A demise of things lying in grant must be by deed.

Things lying in livery, might at common law have passed without deed. And as a feoffment might be made by mere word of mouth, so *a fortiori*, might a lease for life. There needed only the ceremony of livery of seisin to pass the free-

Demise of things lying in livery might in general be made by parol.

(m) As to assignments in law, *vide infra*.

(n) Bird v. Higginson, 4 Nev. and Man. 505.

hold; so that where a man said to another, "I do here demise to you my house for the term of your life," this was a sufficient demise; and, provided livery were afterwards made, would enure to pass a life estate. (o)

Livery of seisin, in deed, or in law, was the usual means of passing a freehold: though it was not necessary, when the freehold passed by matter of record, or under the statute of uses; or by surrender, release, confirmation, &c. (p)

But leases for years required no livery; they were, and still are, considered mere chattel-interests, arising from the contract between the parties, and passing only an interest in the land, and not the freehold. (q)

But now demises for more than three years must be in writing.

Leases for years, or assignments thereof, might therefore, by the common law, have been made by deed, or parol. To remedy the evils arising from parol demises, the Statute of Frauds enacts "that all leases, estates, interests of freehold, or terms of years, or any uncertain interests of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases, or estates, or any former law or usage to the contrary notwithstanding." (r)

"Except, nevertheless, all leases not exceeding the term

(o) Sharp's case, 6 Rep. 26. b. S. C. (Sharp v. Sharp) Cro. Eliz. 482.

(p) Shep. Touch. 210. And see

Vin. Abr. *Feoffment* (B).

(q) *Ibid.* and *vide supra*.

(r) 29 Car. II. c. 3, s. 1.

“of three years from the making thereof, whereupon the
 “rent reserved to the landlord during such term shall
 “amount unto two-third parts at the least of the full im-
 “proved value of the thing demised.” (s)

And “no leases, estates, or interests, either of freehold
 “or terms of years, or any uncertain interest, not being
 “copyhold or customary interest of, in, to, or out of any
 “messuages, manors, lands, tenements, or hereditaments,
 “shall be *assigned*, granted, or *surrendered*, unless it be by
 “deed or note in writing, signed by the party so assigning,
 “granting, or surrendering the same, or their agents there-
 “unto lawfully authorised by writing, or by act and operation
 “of law.” (t)

At present, therefore, all leases for a longer term than
 three years, and *all* assignments and surrenders, must be by
 deed, or by note in writing signed by the parties or their
 authorised agents: and though where the term to be created
 does not exceed three years, and the rent amounts to two-
 thirds of the annual value, a *parol lease* is still sufficient;
 yet the statute absolutely requires that in all cases an *assign-
 ment* should be *in writing*; and the exception as to leases
 not exceeding three years, does not extend to an assignment;
 therefore, where a *parol* assignment was made of a lease from
 year to year, which had been granted by *parol*, it was held
 to be void under the statute. (u) It is not, however, necessary
 that an assignment should be *by deed*; (v) but it must be
 stamped pursuant to the 55 Geo. III. c. 184.

Assignments
and surrenders
must be in
writing,

although lease
commences by
parol.

But a lease for lives *must* be created by *deed*, and be
 attended by the usual solemnities for granting or limiting
 estates of freehold (that is) by livery of seisin, bargain,

(s) Sect. 2.

(t) Sect. 3. This statute is in
 force in the island of *St. Kitt's* in
 the *West Indies*, *vide* *Beckett v.*
Harden, 4 M. and S. 1.

(u) *Bolting v. Martin*, 1 Camp.

318. *Preece v. Corrie*, 5 Bing. 25.

(v) *Farmer dem. Earl v. Rogers*,
 2 Wils. 26. *Beck dem. Fry v.*
Phillips, Burr. 2827.

and sale enrolled, or lease and release, or by grant, if in remainder. (x)

Parol lease not exceeding three years from the making may commence in futuro.

Upon this statute, it was ruled by Lord Holt that a parol lease for three years must begin from the making of the agreement, and cannot be made to commence at a subsequent day. (y) There seems, however, no objection to the tenure commencing at a future day, provided the whole term demised do not extend above three years from the day of the making;—as in the case of a parol demise *habendum* from Lady-day next for a quarter of a year, and so from quarter to quarter so long as the parties shall please;—which Lord Raymond, C. J., held to be good under the statute. (z)

Parol lease for one year certain and so from year to year good.

And where a parol demise was made to hold one year, and so from year to year, as long as the parties pleased, though this was holden to be a lease for two years certain, and if the lessee held on then for another year certain, so as to be an executory agreement which might extend beyond three years; yet as there was never any term for more than two years subsisting at the same time, it was agreed that this demise was not void by the statute. (a)

Parol agreements to pay additional rent good as a collateral agreement to pay so much money.

Where a lease had been made by deed for twenty-one years to A., who afterwards took B. into partnership; and A. and B. made a parol agreement with the landlord, that if he would enlarge the building they would pay him ten *per cent.* on the cost, in addition to the original rent, for the rest of the term which exceeded three years, and the new building was consequently made; it was contended that the new contract for an additional rent was a demise of the new building,

(x) Doe dem. Warner v. Brown, 8 East, 167. Brown v. Warner, 14 Ves. 158.

(y) Rawlins v. Turner, Ld. Raym. 736. Baker v. Reynold, *ibid.* Anon. 12 Mod. 610.

(z) Ryley v. Hicks, Str. 651.

(a) Legg v. Studwick, 2 Salk. 414, and see Stomfil v. Hicks, 2 Salk. 413. S. C. Ld. Raym. 280. Harris v. Evans, 1 Wils. 262. Agard v. King, Cro. Eliz. 775.

and ought, according to the Statute of Frauds, to have been in writing; the Court of Common Pleas held that this parol agreement was not within the statute; that, whatever was subsequently built became part of the premises originally demised. Only the original rent could be distrained for, and this was that merely a collateral agreement to pay so much more money during the residue of the term if the lessee would make the desired expenditure. (b)

On the same principle it was held, that a parol agreement by the tenant to pay 5*l.*, increased rent for the remainder of the term, in consideration of the landlord expending 50*l.* in improvements, was not a contract for *any interest of or concerning land* within the meaning of the statute; for the additional rent could not be distrained for, and would not pass to the grantee of the reversion or descend to the heir of the lessor, but as a matter of personal contract would go to his executor. (c)

By the terms of the statute a parol demise for more than three years is to operate as a tenancy *at will*. The inconveniences attending such a tenancy long made the Courts anxious to raise an implied contract for a year; (d) and it was at length expressly decided, that such a tenancy at will as the statute created should be considered as a tenancy from year to year; and that all the statute meant was, that a parol agreement for more than three years should not operate as a term. (e)

Parol lease for more than three years good as a lease from year to year.

But though such a lease will only create a tenancy from year to year, still it must regulate the terms upon which the tenancy subsists in other respects, as to the rent, the time of the year at which the tenant is to quit, &c.; and therefore,

(b) *Hoby v. Roebuck*, 7 Taunt. 157.

(c) *Donellan v. Read*, 3 B. and Ad. 899.

(d) *Per Lord Kenyon*, *Doe dem. Shore v. Porter*, 3 T. R. 16.

(e) *Clayton v. Blakey*, 8 T. R. 3. *Vide supra*, Cap. I.

where in a lease by parol for seven years, it was agreed that the tenant should enter at Lady Day and quit at Candlemas, the court held that though the lease was void as to the duration of the term, the tenancy could only be put an end to at Candlemas. (f) But to create a tenancy from year to year under a parol agreement to let, such agreement should be absolute and not conditional, or depending on the performance by the tenant of a prior act. (g)

ne,
nd
must
d.
The sovereign cannot demise by parol for any term however short; for he can only grant leases by patent under the great seal, or seal of the exchequer. (h) And in like manner a corporation aggregate can only make leases under the corporation seal. (i) And it has been always held necessary, before and since the enabling statute, that a lease by husband and wife of the wife's lands should be *by deed*, or it will be absolutely void as against the wife, and cannot be confirmed by her after her husband's death; because her assent is necessary *ab initio*, and that assent ought to be *by deed*. (k)

Where a lease is made for life, or for a term of more than three years; or where the rent to be reserved upon a lease, though but for three or fewer years, does not amount to two-thirds of the annual value of the tenement demised, the lease must be by deed, or, not being for life, by note in writing. The more formal method of leasing by deed is usually pursued in demises for years as well as for life; and more especially when the lease is for a long term of years, and the tenements to be demised are valuable.

The parts of a regular indenture of lease are usually set down as six-fold:—

(f) *Doe dem. Rigge v. Bell*, 5 T. R. 471. *De Medina v. Polson*, Holt, 47.

(g) *Doe dem. Rogers v. Pullen*, 2 Bing. N. S. 749.

(h) *Lane's case*, 2 Rep. 17.

(i) *Patrick v. Balls*, Carth. 390. S. C. *Ld. Raym.* 136.

(k) *Turney v. Sturges*, Dyer, 91. *b. Walsal v. Heath*, Cro. Eliz. 656.

I. The *premises* ; containing a statement of the date of the instrument: the names of the parties :—recitals of former acts or writings, and explanatory matter :—the consideration :—the words of demise :—and the enumeration of the tenements demised. The parts of a lease.

II. The *habendum et tenendum* ; by which the quantity of the lessee's interest is ascertained.

III. The *reddendum*, or reservation of the rent.

IV. The conditions, upon which the estate is limited, and subject to which it is to be holden.

V. The covenants.

VI. The conclusion ; consisting of the date of the execution :—the signatures and seals of the parties executing :—and the witnesses to the execution.

All these ingredients are not necessary to the formation of a lease. To constitute a good lease, it need only appear to be the intention of the lessor on the one hand to dispossess himself of the tenements in favour of the lessee by the very making of the lease ; and of the lessee on the other hand to enter and be possessed pursuant to the lessor's consent.

The effect of the Statute of Frauds, so far as it applies to parol leases not exceeding three years from the making, is, that the leases are valid, and that whatever remedies can be had upon them, *in their character of leases*, may be resorted to, but they do not confer the *right* to sue the lessee for damages for not taking possession. (*l*)

A contract to let ready furnished lodgings, is a contract

(*l*) *Edge v. Strafford*, 1 Cr. and J. Stamp, 1 Stark. 16.
391. Tyrw. 393, *et vide* *Inman v.*

concerning land, within the 4th section of the Statute of Frauds, and should be in writing: if the party does not enter, an action for use and occupation cannot be maintained. ^m

If the lease be in a printed form, and certain parts are struck out, the Court may look at the parts so struck out, for the purpose of understanding what the intention of the parties was, and may reject such parts of the remaining form as are inapplicable to such intent, as if the form was intended as a lease for years, and the intention is shewn to be for one year only. ⁽ⁿ⁾

The above enumeration of the parts of an indenture of lease marks out the order in which they may be best considered.

L. THE PREMISES.

1. The premises, including, 1. the date:

1. The *date* of the lease is usually set down the first thing in the deed; but a date is not absolutely necessary: for in a lease for life, not the deed but the livery passes the estate; and in a lease for years, if there be no date, or an impossible date, as the 30th of February, or the 31st of April, the term demised will be taken to begin from the time of delivering the deed, unless some particular time for its commencement be therein specified. But if the deed has a sensible date, the word *date* in the body of the deed, will refer to that period, and not to the date of delivery. ^(o)

2. The parties:

2. Next follow the parties with their proper names and descriptions. Where a lease is made under a power of attorney, the attorney ought to make it in the name of his principal, and not in his own name: because the letter of

^(m) *Edge v. Strafford*, *Inman v. Stamp, supra.* and *Mees*. 539.

^(o) *Styles v. Wardle*, 4 B. and C.

⁽ⁿ⁾ *Strickland v. Maxwell*, 2 Cr. 908. 7 Dowl. and Ryl. 507.

attorney gives him no interest in the lands, but merely authorises him to stand in the place of his principal. (*p*) And so leases by the bailiff of a manor, who cannot by virtue of his office make leases to bind the lord without a special authority, must be made in the lord's name. (*q*)

The person to whom the lease is made ought obviously to be a party; for if A. covenant with B. that C. shall enter and enjoy, this will be a mere covenant, and no lease; because B., with whom it is made, is a stranger, and C., the intended lessee, is no party to the agreement. (*r*)

It has, however, been adjudged that a lease, *habendum* to a person not named in the premises, may be good, (*s*) and where by indenture of lease between A. and B. *only*, A. demised to B. for ninety-nine years, if B. should so long live, and after her death, the remainder of the term to C. her son; who, it appeared by the lease, was then an infant, Lord Mansfield, referring to the case of *Porry v. Allen*, not only held that it could not be objected that C., being an infant, was not a party, but laid down that a grant may be made to a person by a deed to which he is no party; and he is further reported to have said, that the covenant in this case, although not with C., that he should enjoy from the death of his mother for the remainder of ninety-nine years might of itself amount to a lease. (*t*)

3. Recitals of former instruments, or of some antecedent circumstances which have led to the lease in question, are frequently convenient for the sake of clearness and elucidation. In a case in which a lease had been granted by tenant for

3. The recitals :

- | | |
|--|---|
| (<i>p</i>) Combe's case, 9 Rep. 76. <i>b</i> ; | 173. Littleton v. Perne, 1 Leon. |
| D'Abridgcourt v. Ashley, Moore, | 136. Havergill v. Hare, 3 Bulstr. |
| 818. Frontin v. Small, Ld. Raym. | 251. |
| 1418. S. C. Str. 705. Wilks v. | (<i>s</i>) Eeles v. Lambert, Aleyn, 41. |
| Back, 2 East, 142. | (<i>t</i>) Wright dem. Plowden v. Cart- |
| (<i>q</i>) Bac. Abr. Leases, (1), 8. | wright, 1 Burr. 282. |
| (<i>r</i>) Porry v. Allen, Cro. Eliz. | |

life, not in accordance with his power, it was held, a recital of it in a deed of conveyance to a remainder-man, was by way of description only, and did not confirm the lease. (u) But in another case, in which a lease contained a recital of an agreement by the lessee for pulling down an old mill and building a larger one, and the lessee covenanted to hold and leave the new mill in repair, a covenant was implied on the part of the lessee to build the new mill. (v)

In the case of ordinary persons a recital is not a necessary or usual part of a lease; nor is a misrecital material, unless it be of a lease, after the expiration of which, the new term is intended to commence. (w) But in the case of the king, though his grants need not recite any prior lease of copyhold lands or leases not of record, (x) yet where he grants a new estate in a thing in which there is an estate of record already existing, this must be recited in the deed, or the second grant will be void. (y) And any material error in the recital, by which it appears that the king has been deceived, will vitiate his grant. (z)

2- 4. The *consideration* next appears. This must either be *good*, as *natural affection*; or *valuable*, as money and the like; being usually in leases for years the annual rent.

110: 5. The words of demise. The usual terms by which a
1 pre- lease is made, are, "demise, grant, and to farm let:"—but
3 co- according to Sir Edward Coke, the word *dedi* is equally
1200.

(u) Doe dem. Biggs v. Whele, 2 Dowl. and Ryl. 715.

(v) Sampson v. Easterby, 9 B. and C. 422. 4 Man. and Ryl. 423. 6 Bing. 544. 4 Moore and Payne, 601. 1 Cr. and J. 105.

(w) Bath and Montague's case, 3 Ch. Ca. 101. Shep. Touch. 77.

(x) Fulham v. Fulham, March, 206.

(y) Shep. Touch. 76. vide Vin. Abr. Prerogative (Q. b. 2). Bac. Abr. Prerogative (F).

(z) Barwick's case, 5 Rep. 94. a. Needler v. Bishop of Winchester, Hob. 220, 229. Swift v. Heire, March, 31. Chambers v. Mason, Yelv. 47. Aprice v. Hayes, Hardr. 498.

effective. (a) So a licence by the lord to enter and enjoy land; (b)—or a covenant by him with A. to stand seised to the use of A.—will operate as a lease. (c)

In like manner, a covenant or agreement “that A. shall have, occupy, and enjoy land,” &c., (d) will enure as a lease, provided such covenant or agreement be made with the intended lessee, and it appear thereby that it is the intention of the parties to create a present relation of landlord and tenant; (e) and it is not shewn by the instrument itself that at the date of the agreement the party had not power to grant a lease. (f)

There is no distinction between the terms “let and agree to let,” when the relation of landlord and tenant is to commence immediately; the law, however, (g) will not imply an intention in any man to work an injury to himself, when such an injury would follow by construing an imperfect instrument into a lease, and therefore such instrument must, under such circumstances, be taken as an *agreement* for a lease only.

Where a forfeiture would ensue if construed a lease.

(a) Co. Lit. 301. b. Holder v. Taylor, Hob. 11.

(b) Year book, 5 Hen. VII. 1. a. Havergil v. Hare, 3 Bulstr. 252. Trever v. Roberts, Hard. 366. Hall v. Seabright, 1 Sid. 428. S. C. 1 Mod. 14. 2 Keb. 534. Jepson v. Jackson, 2 Lev. 194. Right dem. Green v. Proctor, Burr. 2209. Per Yates, J. But see Tooker v. Squire, 1 Rol. Abr. 848. l. 5, and Pleasants v. Higham, *ibid.* l. 9, where it is said to have been decided that the words, “A. will *suffer and permit* B. to hold land;”—or “is *content* to demise land to B.” will not make a lease, but only an agreement for a future demise.

(c) Right dem. Basset v. Thomas, Burr. 1446.

(d) To have the land, and to have the issues and profits of the land, is

all one. Parker v. Plummer, Cro. Eliz. 190. Lutterell v. Weston, 1 Bulst. 215. And see Pomfret v. Ricroft, 1 Saund. 321. Hare v. Caley, Cro. Eliz. 143. S. C. 1 Leon. 315. Lenthall v. Thomas, 2 Keb. 267; and the observations thereon, in Bac. Abr. *Leases* (I) 6.

(e) Tisdale v. Sir W. Essex, Hob. 34. S. C. Moore, 861. 1 Rol. Rep. 397. 1 Rol. Abr. 847. l. 40. Littleton v. Peine, 1 Leon. 136. Whitlock v. Horton, Cro. Jac. 92. Evans v. Thomas, *ibid.* 172. Drake v. Munday, Cro. Car. 207. S. C. Sir W. Jones, 231. Richard v. Sely, 2 Mod. 79. S. C. 3 Kel. 638. Roe dem. Jackson v. Ashburner, 5 T. R. 163.

(f) Hayward v. Haswell, 1 Nev. and P. 411.

(g) See 7 Bing. 590.

Thus, where a forfeiture would be incurred by making a lease, (as in the case of a copyholder,) and the intention of the parties to make a lease does not clearly appear, the courts will construe it as an agreement or covenant for a lease and not as a lease itself. (*h*)

And where the custom of a manor only authorised a copyholder to let his lands for a certain term, as for three years together, and he made a lease for three years, and covenanted to renew the lease every three years, during twenty-one years, the Court of K. B. held that this was only a lease for three years with an executory covenant for a renewal; and that no forfeiture was thereby incurred. (*i*)

And where a copyholder demised his copyhold to J. S. for one year, and at the end thereof from year to year, for thirteen years more, *if the lord would grant licence, and so as not to create a forfeiture*, this was treated as a mere executory agreement, dependant upon the lord's licence. (*k*)

It has been already stated that a lease may be by deed, or by writing not being a deed, and that it may be created by very informal words; the consequence is, that in a number of cases, it has been extremely difficult to determine whether the instrument was to be considered an actual demise, or only an agreement which equity would enforce.

Where an agreement for a lease contains words of present demise, and there are circumstances from which it may be collected that the tenant was meant to have an immediate legal interest in the term, such an agreement will amount to an actual lease; on the other hand, although words of *present demise* are used, yet if it appears on the whole that no

(*h*) *Lady Montague's case*, Cro. Jac. 301. S. C. (*Hamlen v. Hamlen*,) 1 Bulstr. 189. *Lenthall v. Thomas*, 2 Keb. 267.

(*i*) *Fenny dem. Eastham v. Child*, 2 M. and S. 255.

(*k*) *Lufkin v. Nunn*, 11 Ves. 170, S. C. 1 New Rep. 163.

legal interest was intended to pass, and that the agreement was only preparatory to a demise to be thereupon made; the construction will be governed by the intention of the parties, and the contract will be held not to amount to more than an agreement.

There exists in the books considerable contradiction between the decided cases, particularly where the questionable instrument has contained an express provision that a future lease should be made, which has, in many instances, been held not to control the actual demise, but to have reference to a further assurance of the term granted.

The earliest case upon this point arose before the Statute of Frauds, upon these words:—"I will you *shall have* a lease for twenty-one years of my lands in D., paying ten shillings yearly rent:—*make a lease in writing, and I will seal it.*" This was holden to be a valid lease; the intention of the parties was sufficiently expressed that the one should divest himself of the possession, and the other come into it, and it was considered that the lease to be made was only *for further assurance.* (l) Maldon's case

So where articles were drawn and sealed, by which "it was covenanted between the parties that A. *doth let* certain lands to B. for such a term;" and there was a further covenant, "that a *lease should be made* and sealed according to the said articles, before the feast of All Saints:" the Court held this to be a good *present* lease; the same intention being manifest, and that what followed was only in respect to *further assurance.* (m) Harrington v. Wise.

But a very opposite decision was made in a case, reported however in a book of very doubtful authority, where articles Sturgeon v. Painter.

(l) Anon. Moore, 8. 3 Edw. VI. and 38. Eliz. Cro. Eliz. 486. S. C. S. C. cited as Maldon's case, Cro. cited 1 Rol. Abr. 847. l. 46. S. P. Eliz. 33. Abr. *Leases* (K).

(m) Harrington v. Wise, M. 37

were in these words, "*Imprimis, A. doth demise to B. a close for forty years, with rent reserved, in witness whereof,*" &c., and a memorandum was added, that these articles were to be ordered by counsel of both parties according to due form of law; a lease was actually drawn by counsel, but owing to some disagreement was never executed by the parties, the Court ruled that these articles were not a sufficient lease, and directed the jury accordingly. (n) In this case there were words of actual demise, and an intention shown that the one should divest himself of the possession and the other come into it, and there was no apparent reason for not considering the future lease by way of further assurance.

Baxter v.
Browne.

The doctrine, however, in *Maldon's case*, and *Harrington v. Wise*, was fully recognised and confirmed by a decision made in the year 1775. There A. entered into an agreement (*stamped as such*, and properly signed) with B., and thereby agreed "with all convenient speed to grant a lease to B., and did thereby set and let to him, all that, &c. to hold for twenty-one years from Candlemas next at a rent of 290*l. per annum*:" and it being contended that this was only an executory contract, the Court of Common Pleas, (*absente de Grey, C. J.*), clearly held this a good lease *in præ-senti*, with an agreement to execute a more formal lease *in futuro*. (o) And it will be observed, that the circumstance of the instrument being stamped as an agreement, was not considered a sufficient indication of the intention of the parties, that it should operate as an agreement, to rebut the contrary intention, as shown on the face of the instrument itself.

Barry v.
Nugent.

So in the year 1782, upon a writ of error from the King's Bench in Ireland, an instrument in the following terms was brought under the consideration of the Court of King's Bench.

(n) *Sturgeon v. Painter, Noy.* Weakly dem. *Yea v. Bucknell*, 128. Cowp. 474, and *Lowther v. Lady*

(o) *Baxter dem. Abrahall v. Andover*, 1 Br. Ch. Rep. 397. *Browne*, Bl. Rep. 973. And see

“ Be it remembered that J. Barry, (the defendant,) hath
 “ let, and by these presents *doth demise, &c.* unto R. F. &c.,
 “ for twenty-one years, to commence the 5th May or
 “ 1st November, whichever first happens after the said J. B.
 “ recovers the said lands from M. O., the said R. F. cove-
 “ nanting and agreeing on the foregoing conditions, to pay
 “ J. B. 110*l.* yearly, and every year during the said term,
 “ &c.; *leases* with power of distress and clauses for re-
 “ entering, and all other clauses usual between landlord
 “ and tenant, *to be drawn* and signed at the request of
 “ either party, ‘as soon as J. B. recovers the said lands
 “ from M. O.,” &c. the Court was clearly of opinion that
 the instrument operated as a present demise, and that the
 agreement for a more formal lease was merely in *further*
assurance. (p.)

In the year 1787, a case occurred of a contrary tendency : Goodtitle v.
Way.
 in this instance A. had entered into an unstamped agreement
 with B., to this effect: “ A. doth hereby *agree to let*, and
 the said B. agrees to take all, &c. at a certain rent; B. to
 enter *immediately*; but not to commence payment of rent
 till *Lady-day next*;—*leases* with the usual covenants *to be*
made and executed by the parties before *Michaelmas next* :”
 the Court of King’s Bench, upon a motion for a new trial,
 decided that this was not a lease, but merely an agreement. (q)
 There appears, however, no single circumstance in the case to
 have prevented the Court from coming to a different decision
 in accordance with the former cases.

In a case which was tried in the next year before Lord Doe v. Clare.
 Kenyon, C. J., where an agreement (*on an agreement stamp*)
 was made, by which A. agreed to let B. certain *copyhold*
 premises, to hold the same from the death of M. S. for
 twenty-one years, and promised to *procure a licence to let*
 the said premises; his lordship was of opinion that this

(p) Barry v. Nugent. See this case reported in the argument in Doe v. Ashburner, 5 T. R. 165. (q) Goodtitle dem. Estwick v. Way, 1 T. R. 735.

amounted to a lease, there being words of present demise : but upon a motion for a new trial, the authorities having been fully reviewed, the Court thought that his lordship had been mistaken on two grounds : first, because if there had been a lease, a forfeiture would have been incurred ; (r) and, secondly, because the stamp was an agreement stamp, and was not adapted to an absolute lease. (s) The first of these two grounds was the right one, and clearly sufficient for the parties ; the second was in opposition to *Barter v. Brown*.

Roe v. Ashburner.

The next reported case brings the law much nearer to the old authorities ; for it was there decided, that, admitting the whole to depend upon the apparent intention of the parties, words in an agreement, “ that A. should hold and enjoy,” &c., provided they be accompanied by no restraining words, will operate as a present demise. (t)

Doe v. Smith.

In the case of *Doe dem. Bromfield v. Smith*, (u) the Court of King’s Bench considered the law as clearly settled, that, where in an agreement something, *ulterior the agreement*, is stipulated to be done by way of regular lease, the intention of the parties is to be taken that such agreement shall only operate as an agreement for a lease, and not as the lease itself. And it may be admitted, that such a circumstance is a strong indication of the intention of the parties, that an actual legal interest shall not vest in the lessee until the granting of the regular lease.

Hegan v. Johnson.

In a case at the summer assizes, 1809, *cor.* Lord Ellenborough, C. J., where A. agreed “ that he would by indenture demise to B. a house for fourteen years, from the 25th day of December then last past, at 40*l.* rent payable quarterly ; but if B. should pay A. the sum of 40*l.* before the expiration of the first quarter, which would be at Lady-day then next,

(r) *Vide supra*, p. 86.

(s) *Doe dem. Coore v. Clare*, 2 T. R. 739.

(t) *Roe dem. Jackson v. Ashburner*, 5 T. R. 163.

(u) 6 East, 531.

the rent should be reduced to the rate of 33*l.* *per annum* payable quarterly ;" his lordship acted on the above principle, and held that this was no demise, and the Court of Common Pleas supported his ruling, and refused an application for a new trial. (v)

Then came the case of *Poole v. Bentley*, (w) which is important, as involving several of the points in question. In that case, a memorandum duly signed had been made between P. and B. dated the 12th June, 1806, upon an *agreement stamp*, in these words : " P. hereby agrees to let unto B., and B. agrees to take of P. all that, &c. *for the term of sixty-one years from Lady-day next, at the yearly rent of 120*l.* free, &c.* And that, for and in consideration of a lease to be granted by P. for the said term of years, B. agrees, within the space of four years from the date hereof, to expend and lay out in five or more houses 2000*l.*, and P. agrees to grant a lease or leases of the said land and premises as soon as the said five houses are covered in ; and B. agrees to take such lease or leases, and to execute a counterpart or counterparts thereof. This agreement to be considered binding, till one fully prepared can be produced." At the trial, Lord Ellenborough, C. J., considered this agreement as a lease, and consequently nonsuited the plaintiff. In support of a rule which had been obtained to set aside the nonsuit, the cases of *Goodtitle v. Way* and *Doe v. Smith* were relied on. The rule, however, was discharged ; and Lord Ellenborough delivered his opinion in these words : " The rule to be collected from all the cases is, that the intention of the parties, as declared by the words of the instrument, must govern the construction ; and here their intention appears to have been that the tenant, who was to expend so much capital upon the premises within the first four years of the term, should have a *present legal interest* in the term, which was to be binding upon both parties : though when a certain progress was made in the buildings, a more formal

Poole v. Bentley.

(v) *Hegan v. Johnson*, 2 Taunt. 14 Ves. 156, 409.
148. And see *Browne v. Warner*, (w) 12 East, 168.

lease or leases, in which, perhaps, the premises might be more particularly described for the convenience of underletting or assigning, might be executed. The case of *Goodtitle v. Way* is the strongest in favour of the plaintiff's construction; in which, however, the exact date of the instrument does not appear: but the stipulation was, that leases, with the usual covenants, were to be executed before *Michaelmas*, and the rent which was to be paid half-yearly was not to commence till *Lady-day*, though the tenant was to be let into possession immediately; which looked to a payment under the leases to be granted. The agreement also regarded several leases to be executed in future. In the case last cited (*Doe dem. Bromfield v. Smith*) (x) there was a clause to be added to the lease, and all the other cases contain circumstances of distinction." The rest of the Court concurred in opinion with the Chief Justice. In this case it will be observed, that the circumstance of the agreement stamp being used, was not considered as sufficient to indicate an intention that the instrument should not operate as a lease, so far agreeing with *Baxter v. Brown* in opposition to *Doe v. Clare*, and although several acts were to be done before the actual lease was granted, there was no proposed alteration in the terms, as in *Hegan v. Johnson*, and the concluding words of the agreement, were strong in favour of the construction, that the tenant was to have an immediate legal interest.

Morgan v.
Bissell.

This decision having taken place in Hilary term 1810, an ejectment (y) came on to be tried before *Lawrence, J.*, at the ensuing *Hereford Assizes*, in which the defendant contended that an instrument, dated October 2, 1806, amounted to a lease. It was in the following words: "Mr. *Dowding* agrees to let to Mr. *Bissell* all that farm in the parish of *Cradley*, (except three pieces of land, containing five acres, or thereabouts, and except all trees, saplings, coppices, woods and underwoods, with liberty to fell and carry away

(x) *Supra*, p. 90.

Bissell, 3 Taunt. 65.

(y) *Morgan dem. Dowding v.*

the same,) to hold from the 29th of Sept. last, for the term of twenty-one years, determinable at the *end of the first fourteen years*, on twelve months' notice, at the yearly rent of 226*l.*, payable on the 25th of Jan. yearly, and at and under all other usual and customary covenants and agreements, as between landlord and tenants, where the premises are situate. Mr. Bissell to spend six waggon loads of Worcester dung annually, over and above what is made upon the land; to remove the stocks in Pontix Pitch, (except the pear trees,) into or round the piece of land called Old Cradley, at his own expense; Mr. Dowding to allow 26*l.* a-year for manure, ten loads to be spent annually on the meadow land; to erect a cow-shed, pitch the stable, and pale the fold-yard; to put new gates where wanting; the fold-yard to be completed in a month from this time; the same to be kept in repair by Mr. Bissell, being allowed timber in the rough; to have the use of limestone in the coppice adjoining for the farm, and for sale one hundred and fifty loads; *to allow a proportionate part of the rent from Michaelmas to Christmas*; to put and keep the tiling in repair during the term; *to allow a proportionate part of the rent for the three pieces of land above excepted.* Witness our hands, 1st of Oct. 1806, John Dowding, Joseph Bissell." This instrument being written on an unstamped paper, was signed at the office of the attorney for both parties, who afterwards, about the end of the year 1809, without any especial direction from the defendant, caused it to be stamped with an agreement stamp: but afterwards, in February, 1810, a short time before the trial, caused it to be stamped with a lease stamp, at the defendant's request. The defendant entered on the farm in pursuance of the instrument, as from Michaelmas 1806, and paid rent. A draft of a lease was afterwards prepared; but the parties, being unable to agree on the covenants to be inserted, it never was executed. In order to shew that this instrument amounted to a lease for the defendant, the case of *Poole v. Bentley* was cited; but for the plaintiff the distinction was taken, "that there the concluding words, *this agreement to be considered binding till one fully prepared*

can be produced, made that to be a lease; but that the general rule was, whether a future instrument is contemplated." *Lawrence, J.*, said, "*Where there is an instrument by which it appears that one party is to give possession, and the other to take it, that is a lease; unless it can be collected from the instrument itself, that it is an agreement only for a lease to be afterwards made*; in this particular instrument, however, I see nothing that looks to a future lease, and what passed afterwards I think immaterial." But upon the case afterwards coming before the Court of Common Pleas, that Court was of a different opinion, and held the instrument to be a bare agreement; *Mansfield, C. J.*, delivering the judgment of the Court in the following words:—

"This sort of question which we are now about to decide is an extremely unpleasant one; the good sense is with the modern cases. When the party enters into that which on the face of it appears to be an agreement, though there are words of present demise; yet, if you collect on the face of the instrument the intent of the parties to give a future lease, it shall be an agreement only. It is true, as hath been said, that in most of the cases there have been positive agreements for a future lease, and that there is none such here: but the real question is, what did these parties intend? Now the plaintiff's lessor agrees to let the defendant (not using the strong words which are in *Barry v. Nugent*, and other cases,) all that farm, except, &c.; and he goes on to make particular provisions; and then he says, 'at the yearly rent of 226*l.*, and under all usual covenants and agreements as between landlord and tenant where the premises are situate.' This is not the language in which a lawyer would introduce into a lease the technical covenant for further assurance; but contemplates the entire making of an original lease. Then follows a partial apportionment of the rent from Michaelmas to Christmas, which I do not understand; for the date is the 2nd of October: but then comes an apportionment of the rent for the excepted premises. Now do these words imply, or not, that one of the parties should grant, and the other

accept, a further lease? Would any landlord or tenant of common sense enter on a term for twenty-one years, without ascertaining what were the terms on the one side and the other, by which they were to be bound for twenty-one years, and what was to be the rent apportioned for the excepted premises? The landlord thinks he is injured by a breach of covenant, and brings an action; and then it is to be gone into what are the proper covenants according to the custom of the country? In like manner they must go to a jury to see what is the rent of the excepted land. Does not then this agreement clearly imply that the parties meant to have a lease? The landlord did not mean that the tenant should hold; nor did the tenant mean that the landlord should have the rent; without previously ascertaining what was the rent, and what were the terms on which he should hold. We must, therefore, presume that *they meant to have a future lease*; and then, according to the doctrine of the modern cases, no present interest is conveyed under this instrument: and it would be a very wise rule that wherever one person is about to grant, and another to take a lease, until the lease was actually executed, no interest at law should pass. As to the question, what are usual covenants, it is an endless source of litigation. I have known parties long hung up at an inquiry before a Master of Chancery, what are the usual covenants; and it is the extreme of folly either to give or take possession under such an agreement till a lease is executed: but the convenience of parties sometimes requires it."

It must be allowed that the part of this judgment which refers to the usual covenants and agreements as between landlord and tenant, which words are to be found in *Barry v. Nugent*, is not very satisfactory. But the reasoning, from the uncertain amount of rent, falls within the distinction in *Doe v. Smith*, supported by *Hegan v. Johnson*, as being something ulterior to the agreement stipulated to be done by way of regular lease.

Tempest v.
Rawling.

In the next term, a similar question was debated in the King's Bench. (x) In an action by the landlord against the tenant for mismanagement of a farm, an instrument containing the contract between the parties, stamped with an *agreement stamp*, was offered in evidence: and being objected to upon the ground of its amounting to a lease, and consequently not being properly stamped, *Chambre, J.*, who tried the cause at *York*, admitted the evidence, giving the defendant leave to move to enter a nonsuit. The paper was entitled "conditions of letting the four farms after mentioned, &c., the term to be from year to year. The lands to be entered upon on the 3d of February, 1808, and the housing on the 12th of May, and six months' notice to quit to be given." Then, after stating certain regulations to be observed by the tenant, it proceeded, "*a lease to be made upon these conditions, with all usual covenants.*" At the foot of the paper was written, "I agree to take lot 1, (the premises in question,) at the rent of, &c., subject to the covenants." This was signed by the defendant, and dated the 24th day of November, 1807. A verdict having been found for the plaintiff, a motion was made to enter a nonsuit, and *Poole v. Bentley*, was relied on. But Lord Ellenborough, C. J., said, "This is nothing more than an agreement for a lease which was to be made thereafter; and time was given to prepare it, before the term was to commence. In *Poole v. Bentley*, the tenant was to have immediate possession, and to lay out money in building, and the rent was to commence immediately: here there was no immediate occupation to be taken by the tenant." This decision is clearly contradictory to the cases of *Baxter v. Brown*, and *Barry v. Nugent*, and is barely reconcilable with *Poole v. Bentley*.

Doe v.
Groves.

The next reported case upon this point was decided in Hilary Term, 1812. (a) That was an ejectment for premises in *Garton in Holderness*, tried before *Chambre, J.*

(x) *Tempest v. Rawling*, 13 East, 18.

(a) Doe dem. *Walker v. Groves*, 15 East, 244.

at the previous assizes for the county of York. The lessor of the plaintiff brought the action as landlord against the defendant as tenant. It appeared that the defendant entered upon the premises at old Lady-day, 1798, and that a regular notice to quit had been given. The contract between the parties was in writing, of which each had a part; and one of the parts was offered in evidence *having an agreement stamp only*. This was objected to on the ground of its amounting to an actual lease, according to the determination in *Poole v. Bentley*, and therefore requiring a lease stamp: and a verdict was taken for the plaintiff subject to the opinion of the court on the admissibility and effect of the instrument. The contract was as follows:—"Agreement made this 7th day of March, 1798, between T. Walker, of the one part, and E. Groves of the other. The said T. Walker doth hereby agree to let, and *also upon demand to execute unto the said E. Groves a lease of the farmhouse, farm-stead, and farm*, situate, &c. as the same is now in the occupation of the said T. Walker. And the said E. Groves doth hereby agree to take, and *upon demand to execute, a counterpart of a lease* of the said farm; to hold the same from the 5th of April, 1798, for the term of fifteen years, under the yearly rent of 14*l.* to be paid half-yearly, on the 5th of April, and 10th of October, which said lease is to contain *the usual covenants*, and an agreement for re-entry in case of non-payment of the rent, or non-performance of covenants; and also the further covenants, &c. *That this agreement shall be binding until the said lease is made and executed*. And, lastly, that the said T. Walker shall this present season properly cultivate, and at his own expense sow down ten acres of tillage land, with no less than ten quarters of hay seeds, and ten stone of small seeds." A rule for setting aside the verdict having been obtained, and the case having been argued, the court made the rule absolute, Lord Ellenborough, C. J., saying, "If by the terms of this agreement it had been provided that there should be no entry until a lease was executed, I should have had considerable doubts:—but, as the

case stands, it does appear to me that the instrument must be considered as a present lease from the 5th of April, 1798. From that period *it has the operation of a demise*, not depending upon the contingency of the party's granting a future lease; which was a stipulation only for the better security of the lessee. It falls, therefore, within the case of *Poole v. Bentley*: and in *Barry v. Nugent* the Court thought, notwithstanding it was agreed that leases with the usual clauses were to be drawn, that such a stipulation did not affect the words of present demise. Here the lessee might never have the benefit of an executed lease: in the interim, therefore, this was an agreement to operate as a present demise, commencing immediately from the 5th of April; though a more formal lease was afterwards to be granted. The cases run upon extremely nice distinctions; but I think this must be taken as a lease within the authorities."

It is somewhat singular that the same Judge who decided *Tempest v. Rawling*, on the ground that it differed from *Poole v. Bentley*, inasmuch as immediate possession was not to be given, should, in *Doe v. Groves*, not consider the fact of future possession to be material. It will be observed, that his lordship differed from the Court of Common Pleas in respect of the effect of usual covenants to be inserted in the lease, referring to *Barry v. Nugent*. The strong concluding sentence in *Poole v. Bentley* was, however, to be also found in this case, which was greatly in favour of the construction of its being an actual demise.

Dunk v.
Hunter.

In a late case (b) an instrument was thus worded: "Memorandum of an agreement between H. and D. H. agrees to let on lease *with purchasing clause*, for the term of twenty-one years, all that house, &c., present tenant L., entering on the said premises by D. *any time* on or before the 11th February, 1820, at the net clear rent of 63*l.* per year, and to keep all premises in as good repair as when

(b) Dunk v. Hunter, 5 Barn. & Ald. 322.

taken, (reasonable wear allowed) paying on entry 50*l.* in ready cash, and the rent payable quarterly." The court held that this was clearly only an agreement, contemplating a future instrument, there being *no time fixed* for the commencement of the term, and the stipulation for the payment of money on entry, proving that it could not be an actual demise. The grounds of this decision appear satisfactory.

In an instrument not under seal "A. agreed to let, and B. agreed to take and rent certain premises, to hold *thenceforth* for a term of thirty-four years, determinable by either party, on giving twelve months' notice, at the end of the first seven, fourteen, or twenty-eight years, at a certain yearly rent clear of all taxes; and B. bound himself to keep the premises in tenantable repair during the term; *with a further agreement* on the part of A. to *grant a lease*, on the like terms, *with usual covenants*, within three months;" this was held not to be a lease, though it contained words of present contract. (c) This decision appears opposed to *Barry v. Nugent*, and *Dunk v. Hunter*. Colley v. Streeton.

In a later case, which occurred in Hilary Term, 1826, by an instrument, under seal, A. agreed to take and hire of B. certain premises, at a certain yearly rent, but no time was fixed for the *commencement* or determination of the interest. It was also agreed that A. should take, at a valuation to be made on a future day, the fixtures, furniture, and stock in trade on the premises. The instrument had a stamp of 1*l.* 10*s.* impressed upon it, and it was properly held to be only an agreement for a lease, (d) but that the stamp was not sufficient, it being "a deed not otherwise charged" by the Stamp Act, and should have had a stamp of 1*l.* 15*s.* Clayton v. Burtenshaw.

An agreement was to this effect, "E. I. agrees to let to J. S. three cottages for ten years. He further agrees to Staniforth v. Fox.

(c) Colley and another v. Streeton, 3 Dowl & Ry. 522. Reported also, but not S. P. 2 B. & C. 273. (d) Clayton v. Burtenshaw, 5 B. & C. 41.

build a brewhouse and make a cellar at his own expence at the yearly rent of 35*l.*; he agrees to pay the ground rent, and has this day received 4*l.* from J. S. for earnest. This was held to be an actual demise, &c.; the decision appears to be in strict accordance with the prior cases. (e)

Wright v. Trevezant.

An agreement was entered into between A. and B., by which A. agreed to pay B. 140*l.* a-year, by quarterly payments, for a house, (describing its situation,) for seven, fourteen, or twenty-one years, *at the option of the tenant* at the end of every seven years to commence from January. This was held to be a lease, and not merely an agreement for a lease; (f) this case is important, as shewing that the determination of the term at the option of the tenant will not vary the construction, if the term is in other respects ascertained.

Pinero v. Judson.

An agreement that, *until the lease is executed*, the tenant shall pay rent, and hold subject to the covenants, &c., has been held to amount to a demise, (g) in accordance with the decision in *Poole v. Bentley*.

Doe v. Ries.

So an agreement between A. and B., by which A. agrees to let, and B. to take, &c., for the term of sixty years, being the whole term that A. has the same leased to him, at a rent, &c., the lease and counterpart to be prepared at the expence of B., and to contain all the clauses, covenants, and agreements which A. entered into in the lease granted to him, was held an actual demise. (h)

Warman v. Faithful.

An agreement to lease for a term either of *seven, fourteen, or twenty-one years*, at the option of the tenant, and containing the amount of rent, time of payment, and stipulations for repairs, was held a present demise, although it contained

(e) *Staniforth v. Fox*, 7 Bing. 590. 5 Moore & P. 589.

206, *et vide* *Wilson v. Chisholme*, 4 C. & P. 474.

(f) *Wright v. Trevezant*, 3 C. & P. 441.

(h) *Doe dem. Pearson v. Ries and another*, 8 Bing. 178.

(g) See *Pinero v. Judson*, 6 Bing.

a stipulation that the tenant should pay all the expenses of preparing a lease for either of the terms stated. (*h*) This appears, at first view, a strong case, as the actual term was to be ascertained in the lease to be granted, but in fact it was in substance the same as the case of *Wright v. Trevesant*.

In a recent case an instrument, stamped as an agreement was signed, whereby B. agreed to grant a lease of a messuage from Midsummer then next, at a rent of 105*l.* with certain covenants, and C. agreed to accept the lease on those terms, and to pay an increased rent of 15*l.* from the period there mentioned, and the lessee agreed, on or before Midsummer, to do various acts, such as painting, fixing bells and the like; and it was agreed that the rent reserved in the lease should be 120*l.*, and that the landlord should release 15*l.* by a separate deed; it was held that this was an agreement for a lease and not a demise, although the lessee had entered and occupied. (*i*)

Rawson v. Eicke.

After an offer to let, and proposals by letter of the terms of the tenancy, and for a valuation, and lease to be prepared, and an answer by the landlord, accepting the terms, and stating the time when the lease should commence and possession given, the agreement was held to be a present demise, entitling the lessor to distrain. (*k*)

Chapman v. Bluck.

In a very recent case, (*l*) it appeared that by a written instrument stamped with a deed stamp, Edward Sheppard agreed to demise and let to several persons (being a committee for the parish of Hungerford) the premises in question, in trust for the inhabitants of the parish; and the committee thereby agreed to accept and take the same to hold unto the committee, from the 25th of March then next, for the term of ninety-nine years, at the net rent of 27*l.*, payable half yearly, and the committee agreed to pay the rent and taxes, &c.

Alderman v. Neate.

(*h*) *Warman v. Faithful*, 3 Nev. N. S. 187. & M. 137.

(*i*) *Rawson v. Eicke*, 2 Nev. & P. 423.

(*k*) *Chapman v. Bluck*, 4 Bing.

(*l*) *Alderman and Wife v. Neate and others*, 4 Mee. & W. 704, et vide Doe dem. *Jackson v. Hiley*,

10 B. & C. 885.

and keep the premises in good repair, and the parties agreed that a lease and counterpart should be prepared and executed on or before the 1st of January then next, with covenants and agreements pursuant to that contract, and such other general clauses as were usually contained in leases, with an option to the committee to purchase the inheritance for 420*l*. This appears, according to the authorities, to have been a clear case for a lease, and was so decided by the Court of Exchequer, which also held that the lease had vested in the churchwardens and overseers of the poor, pursuant to the 59 Geo. III. c. 12, s. 176.

General observations,

No ingenuity can reconcile some of the foregoing cases. The intention of the parties is allowed to be the proper criterion by which the nature of the instrument is to be judged: if no certain time is fixed for the commencement of the term, or if any thing is to be done ulterior to the agreement, prior to granting the lease, such may, it seems, be a sufficient indication of intention not to grant an immediate interest; but there is scarcely any other circumstance which can with safety be relied on as shewing that intention.

The reference to a future lease, if attended with present possession, may in general be treated as only a stipulation for further assurance. The option of the tenant to hold for seven, fourteen, or twenty-one years is perfectly consistent with an actual demise, and stipulations for building, repairing, or the like, will not of themselves be sufficient to prevent a like construction; and although in some of the cases, the stipulation that the lease shall contain the usual covenants, has been held sufficient to prevent the construction of an actual demise; yet the general current of the authorities seems opposed to that construction.

If however, an instrument contains an *express* proviso, that it shall not operate as a lease, nor any further than as an agreement for a lease, it will not be a demise, nor require a lease stamp, although the possession is to be immediately parted with by the lessor; and therefore it appears advisable to introduce

a stipulation of that nature in all cases where it is intended that the instrument shall not operate as a demise. (*m*)

Whether a sum agreed to be paid for non-performance of the agreement is to be considered as liquidated damages, or a penalty may in any case be a question of some nicety. If the act to be performed is single, the sum may, it seems, be exacted as liquidated damages. But if the sum is to be paid for the non-performance of several acts of different degrees of importance, it will be construed as a penalty. (*n*)

Whether liquidated damages or penalty.

Where, however, as has been before observed, a forfeiture would accrue by construing the instrument as a lease, it shall be construed as an agreement. (*o*) It would, indeed, be presuming extreme folly in the parties, or at least extreme ignorance of the tenure of their estates, if they were supposed to have entertained a purpose which must necessarily defeat itself.

It may here also be observed, with reference to this class of cases, that where a man signs an instrument on unstamped paper, which the legislature has commanded to be stamped, he thereby incurs a penalty. If, therefore, a man sign a paper stamped as an agreement, and it be a question of considerable doubt, whether he meant it for an agreement *or a lease*, in determining that doubt it may deserve some consideration, that if he meant it for a lease, he has incurred a penalty; because the stamp he has affixed to it is in fact no stamp at all. (*p*)

(*m*) *Perring v. Brooke*, 7 C. & P. 361.

(*n*) *Boys v. Ansell*, 5 Bing. 390. N. S.

(*o*) *Fenny dem. Eastham v. Child*, 2 M. & S. 255, *et vide supra*.

(*p*) See *Doe v. Clare*, *supra*. This argument has been introduced into most of the cases, and appears in some to have had at least its due weight. But it can operate only when *the intention of the parties* is doubtful, and unless it be in evidence that the stamp

has been selected by them, or their advisers, before they signed the instrument, it should seem to be entitled to very little attention. The sort of instrument which gives rise to this question, is generally drawn out in a hurry, and signed upon a paper not stamped at all. The stamp presented to the Court is that which the party producing it is advised is best after the doubt has arisen. *Morgan v. Bissell*, *supra*, p. 99, and *Clayton v. Burtenshaw*, *supra*, p. 99.

6. The parcels demised.

6. The particular tenement intended to be demised is next specified. The word "land" will, unless a contrary intention is shewn, be sufficient to pass not only the soil, but all that grows or is built upon its surface, together with all that lies below it; but in general, the particular subjects of demise are specified. (q) A *farm* includes houses and lands; and so a *grange* includes not only barns, but stables and out-houses used for the purposes of husbandry. (r)

In some cases, a grant of the *produce* of the soil will pass the soil itself: thus *pasture* will be taken not only as the *feeding on the land*, but as the land itself; (s) and so the grant of a *wood* will pass the soil, as well as the timber. (t)

But whether a thing be demised or not is a question which, where there is ambiguity in the instrument, is always to be solved by evidence. Where the grant is in its terms *certain*, no evidence can be admitted to vary it: but it frequently happens that premises demised are so loosely described, that, unless such evidence were admitted, great inconvenience might prevail. (u)

By the demise of a messuage, with all rooms and chambers thereto belonging and appertaining, is to be understood all that is occupied together as the entire messuage, *at the time of the demise*: and, therefore, such a demise will not comprehend a room, which had once formed part of the messuage, but which had been separated from it by means of a wooden partition, and had not been occupied with it for many years *previous* to the demise. (v)

(q) Co. Lit. 4 Burton v. Brown, Cro. Jac. 648. *Water* can only pass as *land* covered with water. Co. Lit. 4. a.

(r) *Ibid.* So a *castle* includes a manor, 2 Inst. 31; and see the various tenements accurately defined. Co. Lit. 4. 5.

(s) Co. Lit. 4. b.

(t) *Ibid.* Demise of a manor, without saying *cum pertinentibus*:

an advowson appendant does not pass. Higgins v. Grant, Cro. Eliz. 18. London v. Southwell, Hob. 304.

(u) Doe dem. Freeland v. Burt, 1 T. R. 701. See also Hunt v. Singleton, Cro. Eliz. (473.) and 3 Wms. Saund. 401. n. (2).

(v) Keralake v. White, 3 Starkie, 508.

By lease, granted in 1814, to take effect from 1820, certain houses, together with a piece of ground, which was part of an adjoining yard, were leased to a tenant, together with all ways with the said premises, *or any part thereof*, used or enjoyed before. At the time of granting the lease, the whole of the yard was in the occupation of one person, who had always used and enjoyed a certain right of way to *every part* of that yard: it was held that the lessee was entitled to such right of way to the part of the yard demised to him. (w)

But where a lease of premises described them as abutting on an "intended way of thirty feet wide," which was not then set out, and the soil of which was the property of the lessor; and an underlease was granted, describing the premises as abutting on "an intended way," not mentioning the width; it was held that the underlessee was entitled to a convenient way only, and could not maintain an action against the owner of the soil for narrowing the road to twenty-seven feet; no actual injury having been sustained. (x)

As between the occupiers of adjoining fields separated by a hedge and ditch, the hedge, *prima facie*, belongs to the field in which the ditch is not. If there are two ditches, with a hedge between them, the ownership of the hedge must depend on evidence. (y)

7. After the tenements are set out, an exception is frequently introduced in favour of the lessor: but, as this is his own act in his own favour, such exceptions will be construed strictly against him. The requisites to make a good exception, are enumerated in *Sheppard's Touchstone*. (z)

7. The exceptions.

1. The exception must be in apt words: as "saving,"—"excepting," &c. (a) 2. It must be part of the *thing de-*

(w) *Kooystra against Lucas and others*, 5 Barn. & Ald. 830, *et vide Morris v. Edgington*, 3 Taunt. 24. *Crisp v. Price*, 5 Taunt. 548.

& Cres. 96.

(y) *Guy v. West*, 2 Selw. N. P. 1342. 9 edit.

(z) P. 77.

(a) Co. Lit. 47. a.

(x) *Harding v. Wilson*, 2 Barn.

Distinction
between excep-
tions, reserva-
tions and privi-
leges.

mised, (as timber, trees, mines, and quarries, and not of some other thing, as rent, heriot, suit of court, and suit of mill, which are strictly *reservations*, or liberty of hawking, hunting, fishing, and fowling, which is a *privilege*. (b)) 3. It must be *part* only, and that not the greater part. (c) 4. It must be of such a thing as is severable from the thing granted, and not an inseparable incident. Therefore, if a lease be made of a *rectory*, except the glebe, the exception is void; for no rectory can exist without glebe: and so of a *manor*, excepting the demesnes. (d) It must be of such a thing as he that doth except may have, and doth properly belong to him. 6. It must be of a particular thing out of a *general*; and not of a particular thing out of a particular, or of a part of a certainty; as of one acre out of twenty acres; or a demise of a house *and shops*, except the shops. (e) 7. It must be certainly described, and set down; as if a man grant all his lands *in Essex*, except his lands *in Dale*, or excepting one particular acre, such exception is good; but if the exception be of a chamber in a house, or of an acre, without saying which particular chamber or acre, the exception is void. (f)

Hawking and
hunting.

A reservation of hawking and hunting does not extend to shooting. (g)

If a man be possessed of a new house and an old house, and make a lease, with the exception of the new house for the use of the lessor, when he pleases to reside there, and at other times for the use of the lessee, the new house is well excepted; and the exception is not avoided by the words "at all times to be used by the lessee, when the lessor doth not dwell there:" for that sentence shall not enure as an exception out of an exception, (which sets the matter at large,) but only as a declaration of the lessor's intention in making the exception. (h)

(b) Doe dem. Douglas v. Loch,
2 Ad. & Ell. 705.

(c) 2 Rol. Abr. 454. l. 38.

(d) Mabie's case, Winch, 23.

(e) 2 Rol. Abr. 453. l. 52. 454.
27. Dorrell v. Collins, Cro. Eliz. 6.

(f) Shep. Touch. 78, 79.

(g) Moore v. Earl of Plymouth,
7 Taunt. 614. 1 Moore, 346.

(h) Cudlip v. Randall, 3 Salk.
156. S. C. 4 Mod. 11. 12 Mod. 14.

So if a man lease his houses, excepting his new house, *during the term*, this exception is good: but if he except it *during life*, it is void; or, if a man, having a term of two houses for certain years, grant his houses, excepting one of them, for life, this exception is void; for the words “during life,” qualify the exception, and shew his intent that the one house shall not be excepted during the whole term. (i)

The same rule obtains as to what is included in the particular thing excepted, as was before stated in respect of the particular thing demised. Therefore an exception of “all the wood,” will be an exception of the soil whereon the wood grows. (k) So, if all the underwood and copse wood be excepted, the land will also be excepted; unless it clearly appear that it was merely the intention of the parties to except only the wood itself. (l) And so of an exception of fruit trees. (m) But where *timber trees* are excepted, the soil in which they grow will not be covered by the exception. (n) Under an exception of “all wood and underwood,” trees great and small are generally excepted: but not *fruit trees*, which have frequently been decided not to fall within the description of *wood* or *trees*. (o) And in a recent case where the exception was of all timber trees and other trees, but not the annual fruit thereof, it was held that apple trees were not within the exception. (p)

Exception of
woods.

If the tenants have the use of a yard with a pump and privy, and are interrupted by the landlord, the question to be put to the jury is, not whether the landlord *reserved* to

(i) Per Holt, C. J. *ibid.*

(k) *Ive v. Sams*, Cro. Eliz. 521.
Bacon v. Gyrling, Cro. Jac. 296.
Whistler v. Paslow, *ibid.* 487.

(l) *Ibid.* and *Pincomb v. Thomas*, Cro. Jac. 524.

(m) *Smith v. Bole*, Cro. Jac. 458.
S. C. 3 Bulst. 290.

(n) *Whistler v. Paslow*, Cro. Jac. 487.

(o) *London v. Southwell*, Hob.

304. *Ld. Zouch v. Moore*, 2 Rol. Rep. 280. *Whittie v. Weston*, Godb. 398. See also *Wyndham v. Way*, 4 Taunt. 316. But it seems it will be otherwise, by the description of all trees *cujuscunque generis, naturæ, nominis, aut qualitatis*, Godb. *ubi sup.*

(p) *Bullen v. Dunning*, 5 B. & C. 842.

himself the *locus in quo*, but whether he demised the easement to the tenants. (*q*)

Lodgers, rights of.

Lodgers have a right to the knocker and door-bell, skylight, and water-closet, unless any of them are excepted out of their letting. (*r*)

Waste annexed.

If the tenant annex to his farm part of the waste, it enures to the benefit of the landlord. (*s*)

II. THE HABENDUM ET TENENDUM.

The *habendum et tenendum*.

The *habendum et tenendum* is that part of the lease which determines the time for which tenements demised are to be holden, and the quantity of the estate granted; and it may qualify any part of the premises, provided it be consistent therewith; for if it be repugnant, it will for such part be utterly void. (*t*) An estate for life needs nothing to express the time at which it is to commence, because it cannot at common law commence *in futuro*; nor can its duration be ascertained. But as it is the very essence of a *term* to be precisely fixed and defined, the time both of its commencement and termination must appear with sufficient certainty *sed id certum est quod certum reddi potest*.

The commencement of the term must be certain.

1. The time at which the term is to *commence* must therefore be certain. In an old case, it was said that where a term is made to commence from the nativity of our Lord, without saying the *feast* of the Nativity, the lease is void (*u*) and in another case, where a lease was made on the 10th of October, *habendum* from the twentieth day of November, (without expressing in what

(*q*) Herbert *v.* Thomas, 1 C. M. & R. 861.

(*r*) Underwood *v.* Burrows, 7 C. & P. 26.

(*s*) Doe dem. Harrison *v.* Murrell. 8 C. & P. 135.

(*t*) Shep. Touch. 75, see Lilly *v.* Whitney, Dyer, 272. *a.* Germaine *v.* Orchard, 1 Salk. 346. The *tenen-*

dum was originally introduced to denote the person of whom the estate was holden. The statute *quia emptores* made this unnecessary in feoffments.

(*u*) Per Twysden, J., in Foote *v.* Berkeley, 1 Sid. 461. S. C. 2 Keb. 656. Siderfin adds a query.

year) for five years, the Court held that the lease was void for uncertainty. (v) But where a lease was made for years, to begin at the feast of our Lady *Mary*, (without saying which feast, annunciation, purification, &c.,) it was holden by Anderson, C. J., that the lease was good ; and that the lessee by his entry might determine at which of the said feasts the term should begin. But *Periam, J.*, doubted of it. (w)

In general, however, where the lease is by deed, and the time from which it shall commence does not appear, it shall be taken to commence from the delivery of the deed ; as where the lease is made to commence from the day of the date, and no date, or an impossible date (as the 30th of February or 32d of July) is inserted : or if it be expressed to be from the *making* ; (x) or from the ending of a former lease, and no such lease in fact exist, or if the prior lease be void in law. (y)

But where no time is specified, it commences from the delivery of the deed.

And when a prior lease is *mis-recited* in a material point, and the new lease is made to begin after the expiration of such mis-recited lease, the new lease shall commence in computation from the *delivery*, as if no such prior lease were in existence, because there is nothing to ascertain the commencement of such term. (z) But if the new lease had mis-recited a lease to A. and then had been made for twenty-one years to commence after the expiration of *the term of A.*, the mis-recital would be unimportant, and the new lease should begin from the determination of A.'s term. (a)

And so where a prior lease is mis-recited.

(v) Anon. 1 Mod. 180. Two judges thought it void ; and two thought it should begin from the delivery : but afterwards, one of the two latter being absent, the two former gave judgment against the one.

(w) Anon. 1 Leon. 227.

(x) Co. Lit. 46. b.

(y) *Ibid.* Miller v. Maynwaring, Cro. Car. 397. S. C. Sir W. Jones, 355. Basset v. Lewis, 1 Lev. 77.

(z) Co. Lit. 46. b. Miller v. Mayn-

waring, *wb. sup.* Bishop of Bath's case, 6 Rep. 35. And according to one case, though the new lease expired before the old one, so that the new lessee could never lawfully enter, yet he would be bound to pay rent for the whole of his term. *Vide* Bac. Abr. *Leases*, (L) 1. But see Anon. Dyer, 261. b. and Seaman's case, Godb. 166.

(a) *Per* Keeling and Twisden in Foote v. Berkeley, 1 Lev. 235, and see Woodhouse's case, Dyer, 93. b.

And where a lease purported on the face of it to have been made on the 25th of March, 1783, *habendum*, to the lessee from the 25th of March now last past, for thirty-five years; and there was evidence to shew that the lease was not executed until after the 25th of March 1783, it was held that it took effect from the time of delivery, and not from the day of the date, and consequently that the term commenced on the 25th March, 1783, and not on the 25th March preceding the date of the deed. (*b*)

The words "from the date," &c. may be taken either inclusively or exclusively.

Where a lease was made to begin *from the date*, it was formerly holden that it began *upon* the day of the date, *inclusive*; but that, if it were to commence *from the day of the date*, this excluded the day, and it began on the day after the date. (*c*) And so it seems that a lease *from the 24th of June* was formerly taken to commence on the 25th. (*d*) But this subtle distinction is no longer regarded; and it is now decided, that the word "from" may be taken either inclusively or exclusively, according to the context, and the apparent intention of the parties. (*e*)

Feast days are to be taken according to the new style.

Since the alteration of the style, a lease *by deed* made to commence from the feast of *St. Michael* will be taken to begin from *New Michaelmas day*; and extrinsic evidence cannot be received to shew that *Old Michaelmas day* was meant. (*f*) But it has been held that this only affects leases by deed; and where a lease, by parol, was made to commence at Lady-day, the Court of King's Bench held that evidence was admissible to prove that, by the custom of the country, this meant Old Lady day. (*g*)

(*b*) *Steele v. Mart*, 4 B. & C. 272.

(*c*) *Hatter v. Ash*, *Ld. Raym.* 84. *S. C.* 3 *Lev.* 438. *Salk.* 413.—It was settled in *Llewellyn v. Williams*, *Cro. Jac.* 258, that "henceforth" and "from the day of the date," are convertible terms.

(*d*) *Macdonnel v. Weldon*, *Str.* 550.

(*e*) *Pugh v. Duke of Leeds*,

Cowp. 714. The words "day of the date" in general mean the "day of the execution of the deed." *Underhill v. Horwood*, 10 *Ves.* 209.

(*f*) *Doe dem. Spicer v. Lea*, 11 *East*, 312.

(*g*) *Doe dem. Hall v. Benson*, 4 B. & A. 588. In this case, as well as in *Doe v. Lea*, the case of *Furby dem. Mayor, &c. Canterbury v. Wood*, before *Ld. Kenyon*, 1

But though the commencement of a term must be fixed with certainty, it will be sufficient if it be so fixed when the lease is to take effect in interest or possession; for until that time, it may depend upon an uncertainty, viz., either a possible contingency, which is to precede the interest or possession, or upon a limitation or condition subsequent; but where it is to be reduced to a certainty upon a precedent contingency, such contingency must happen in the lives of the parties. (*h*)

It is sufficient if the commencement be fixed before the lease takes effect.

If A. seised of lands in fee, grant to B. that when B. shall pay to A. twenty shillings, he shall thenceforth hold the land for twenty-one years, and B. afterwards pay the twenty shillings, in this case, B. shall thenceforth have a good lease for twenty-one years. (*i*)

Where it depends upon the payment of money;

So, a lease from the day of the lessor's death until the first of May, 1629, was holden to be good for so much of the term as remained after the lessor's death. (*k*)

or the death of J. S.;

So, if A. grant to B. that if his tenant for life shall die, B. shall have the land for ten years, this is a good lease:—and so if one make a lease for years “after the death of C., if C. die within ten years,” this is a good lease, if C. die within ten years; otherwise not. (*l*)

So if a lease for years be made of land already leased for life, to hold from *Michaelmas* next after the death of the tenant for life, or after other the determination of the estate, this lease will be sufficiently certain in its commencement. (*m*)

Esp. N. P. C. 198, was cited, in which his lordship had admitted similar evidence: and in both it was assumed that the lease was not by deed. Being by a corporation it must have been, and from the report in *Espinasse* it appears that the defendant held under a lease from the corporation.

(*h*) Shep. Touch. 272, 273. Doe

dem. Hall v. Richardson, 3 T. R. 462.

(*i*) Shep. Touch. 273.

(*k*) Child v. Bayley, Cro. Jac. 459. Grute v. Locroft, Cro. Eliz. 287. *sed vide*. Capenhurst v. Capenhurst, *infra*.

(*l*) Shep. Touch. 273.

(*m*) *Ibid*.

or the avoidance of a prior lease ;

So if A. make a lease to B. to begin after the death of C. on condition to be avoided upon certain acts by others ; and afterwards make another lease, *habendum* after the determination of the former ; it seems that this latter will be a good lease, and its commencement sufficiently certain. (n)

If one make a lease to A. for twenty-one years and afterwards make another lease to B. for years, *to begin from the end and expiration of the aforesaid term of twenty-one years demised to A.* ; and then the lease to A. be determined by surrender or otherwise ; the lease to B. shall begin presently. But if the lease to B. had been *to begin after the end and expiration of the aforesaid twenty-one years*, there the lease to B. should not begin upon the surrender, forfeiture, or other determination of the first term to A. ; but only after the twenty-one years had actually run out by effluxion of time : the reason of which difference is, that in the first case the word “ term ” comprehends as well the estate or interest in the land, as the time for which it is demised ; and therefore the second lease being limited from the end and expiration of the aforesaid term of twenty-one years, whenever the term is determined, the lease to B. shall begin : but in the other case the lease to B. is not to begin till after the *end and expiration of the twenty-one years*, which cannot be ended but by effluxion of time. (o) But where by indenture of lease A. demised to B. for ninety-nine years, if she should so long live, and after her death, if she should die within the said term, or other end or determination of the said *term*, the remainder *thereof* to C. for the residue of the said *term*, it was said by Lord Mansfield that the word “ term ” might signify the time as well as the estate, so as to raise the question of construction in what sense the word ought to be understood ; and in that case it was held that the remainder-man should enjoy during all the residue of the years to come. (p)

So in a late case it was held that the “ word ” term in a

(n) *Ibid.* 274.

(o) Bac. Abr. *Leases*, (L) 1.

(p) Wright dem. *Plowden v. Cartwright*, 1 Burr. 282.

covenant for quiet enjoyment, might signify either the time or the estate granted. Thus where tenant for life granted a lease for three lives, not conformably to his power, and covenanted for quiet enjoyment "for and during the said term." In an action against the heir-at-law for damages on breach of the covenant, the Court held that the parties intended by the word "term" in the covenant, a term to continue as long as any of the *cestuis que vie* lived, and not a term to continue only for the life of the grantor. (q)

In a lease for years to A. there was a proviso for re-entry if the lessee died within the term, it was held that this was a mere condition, and not a limitation; and that a second lease, *habendum* after the first lease should become void after or by the death of the lessee, or surrender or forfeiture by him, was good to commence when the term granted to the first lessee had expired by effluxion of time, there having been no re-entry upon his death. (r)

In a case where B. had a lease for twenty-one years of copyhold lands to commence after the *determination of the estate which A. at that time had therein*, and the widow of A. being entitled to her free-bench, happened to outlive her husband twenty-one years, it was held by the Lord Chancellor, that the estate of the wife was an excrescence of her husband's estate, which did not determine until the wife's death, at which time the lease made to B. should commence and continue for twenty-one years. (s)

Some perplexity appears to exist in reference to concurrent leases; leases *in futuro*; and leases or grants of the reversion. Of concurrent and other leases.

It has been recently decided, that if a term of years is granted in possession, and a second lease is granted to commence at the

(q) *Evans v. Vaughan*, 4 B. & C. 261. see *Veal v. Roberts*, Cro. Eliz. 199.

(r) *Fish v. Bellamy*, Cro. Jac. 71. by three justices against two. And (s) *Irish v. Hook*, Bac. Abr. *Leases*, (L) 2. p. 176. And see *Chantrell v. Randall*, 1 Lev. 20.

expiration of the existing lease, no reversion will pass by the second deed, nor will the second lessee be entitled to any interest under it, except a mere *interesse termini*, and the lessor will consequently be entitled to the rent reserved by the first lease, and to distrain for it. (t) This appears to be a clear law, and not open to argument.

If a lease is in existence, and a second lease is made to commence in possession, this is a concurrent lease, but the authorities are not very clear as to its effect. It must be remembered, that a lease for years is but a contract, governed by the intention of the parties; and in *Rawlin's case*, (u) it was held, that if A. make a lease on the 1st of January to B. for six years from the date; and afterwards, *on the same day*, make a lease of the same premises to C. for twenty years from the date, C. has a good lease in reversion for fourteen years; that it is not any grant of the reversion, but a future interest in reversion; no term, but an interest of a term, as the pleading is; and that, notwithstanding such grant, the reversion (without attornment) remained in the grantor, and he should have the rent reserved upon the first lease, but if there was attornment, then the reversion passed.

In *Bacon's Abridgement* it is considered that in the above case, C. would have his election to take such lease, if by deed, as a reversion, if he could prevail for an attornment by B., the tenant in possession, or if not, then, as a future *interesse termini*, to take effect in possession upon the determination of the first lease; but if by parol, the second lease could only take effect as an *interesse termini*, because a reversion can only pass by deed. (v)

Sir Edward Sugden, in his valuable *Treatise on Powers*, (w) speaking of concurrent leases under powers observes, if the second lessee should enter and be ousted, as of course he

(t) *Smith v. Day*, 2 Mees. & W. 684. Carth. 247; *Goodright dem. Nichols v. Mark*, 4 M. & S. 31.

(u) 4 Rep. 53. a.

(w) *Bac. Ab. Leases* (N). p. 18.

(v) *Et vide Hilman v. Hore*,

would, the rent on the second lease would, it seems, be suspended, or it might be thought, that as at this day leases are made by deed, the second lease would take effect by estoppel, (x) as a lease in possession, and attornment being now unnecessary, would carry with it the right to the rent reserved by the first lease.

The true explanation probably is, that the lease being a contract, the intention will in all cases govern the decision.

But there can be no doubt that in those cases in which the intention is plain to execute a *grant of* the reversion, the rent will pass without attornment.

If there be any ambiguity or contradiction in expressing the time at which the second lease is to begin, the lease shall be construed beneficially for the lessee, on the principle that every man's grant shall be taken most strongly against himself. As where a termor granted *all his estate and interest*, to another, *habendum* to the grantee and his assigns *immediately after the death of the grantor*, the Court held that the *habendum* was void, and *the premises* of the grant good to make the entire term pass to the grantee immediately. (y)

Ambiguity is to be taken favourably for the lessee.

A. leased for thirty-one years, and four years after the beginning of that term made a new lease in these words:—"Know that I—the aforesaid thirty-one years being completed—have demised and granted all the premises, &c. to hold *from the day of making these presents, the term aforesaid being finished*, until," &c.—and the question being raised, whether this lease were to begin in *computation* from the making of the new lease, or from the ending of the old one, the Court held that it should begin to take effect in *possession*, at the end of the former term, and not before; for otherwise the lessee would only have a lease for four years, which did not seem to be the intention of the parties; and every grant is to be construed most strongly for the grantee. (z)

(x) P. 619, 5 edit.

272. a.

(y) *Lilley v. Whitney*, Dyer, (z) *Anon.* Dyer, 261. b. pl. 28.

In a subsequent case, a lessee for a hundred years made a lease for forty years to B. if he should so long live ; and afterwards leased the same lands to C., *habendum* after the term of B., for twenty-three years to be accounted *from the date of these presents* ; and the question was, if the latter lease should be said to begin presently, or after the term of B. ? The Court of Common Pleas were clearly of opinion, that the lease to C. should *not be accounted from the time of the date*, but *from the end of the term of B.* ; because by the first words it is a good lease to begin after the term of B., and it shall not be made void by any subsequent words. And Coke, C. J., said, that if the limitation be not certain when the term shall begin, it shall be taken most beneficially for the lessee. (a)

A lease may begin in interest at a present, and in computation at a future day.

It is observable that in the two latter cases, the making and delivery of the lease passed a present interest to the lessee, though the computation of the term was not to begin until a future day. (b) It appears, therefore, that a lease may begin in *interest* at a present, and in *computation* at a future day.

Or at a past day.

In like manner a lease may be made to commence in interest at a present, and in computation from a *past* day. As where a lease was dated on the 4th of May, and delivered on the 5th “ to hold from Lady-day *then last past*, for the term of twenty years, next after the date,” it was decided that the lease began in *computation* from the Lady-day *preceding* the date, and in *interest* from the delivery of the lease. (c) So a lease may commence in computation from a present, and in occupation from a future day ; as where an indenture of demise bore date 25th March, 15 Car. and was delivered the day of the date, and the *habendum* “ was from and after the day of the date of these presents, for and during the term and time of seven years henceforth next and immediately following fully to be com-

(a) Seaman's case, Godb. 166.

(b) Com. Dig. *Estates*, (G) 14.

(c) Moore v. Musgrave, Hob. 18.

plete and ended;" which lease was holden to begin in *computation*, from the delivery of the deed, which was the day of the date, although it appeared that the lessee was not to have the possession until the next day after the date, by the words *habendum* from and *after* the day of the date, which excluded the day of the date. (*d*)

A lease was made on the 10th of October, 1735, to hold from the 1st of March then last past for fifty years *then next ensuing*; the said term to commence and begin immediately after the determination of an existing lease made between the same lessor and lessee of the same premises, paying rent from the commencement of the term. (*e*) In an action of covenant on the lease, it was objected on demurrer that it was void, because the term was uncertain as to its commencement; for by one part of the *habendum* it was to commence from the 1st of *March* preceding the date, and by another part it was to commence from the determination of a former lease. On the other side, it was answered that the lease was good, because the commencement might be rendered certain by the determination of the former lease; and that in point of *computation* it commenced from the 1st of March preceding the date, but in point of *occupation* it was only to take effect from the determination of the prior lease: in support of which distinction *Moore v. Musgrave*, and *Cornish v. Cawsey*, (*f*) were cited: the Court acquiesced in this; and Lord *Mansfield* said, "The new lease is in *point of interest* to take its commencement from the determination of the former one only." (*g*)

By *interest*, (if the Report be correct) Lord Mansfield could mean nothing else but occupation; because a lessee for years, as soon as the lease is executed, has an interest, although the lease be made to commence at a future day. But the decision in this case, as far as it regards the time

(*d*) *Cornish v. Cawsey*, 1 Rol. Abr. 850. l. 30.

(*f*) *Supra*.

(*e*) It does not appear by the report for what term.

(*g*) *Enys v. Donnithorne*, Burr.

1190.

from which the term was to be computed, seems very questionable; inasmuch as it falls within the two cases cited above from Dyer and Godbolt, where the computation of the new lease was holden to begin from the ending of the old one; which seems to have been the meaning of the parties in this case.

The extent of the lease must be ascertained by express words,

or be capable of being so, by reference to certain matter.

2. The commencement of the term being absolutely fixed, it is next necessary that its extent and duration should be accurately ascertained, either by the express limitation of the parties, or, as in the case of the commencement, by reference to some collateral or extrinsic circumstance, which may with equal certainty fix the length of its duration: for without such ascertainment the lease will be void for uncertainty. (*h*)

As if a lease be made for so many years as A. shall live; no certain number of years being named, the lease as for a term will be void. (*i*)

So, if the parson of Dale make a lease for so many years as he shall be parson there, this is void, because it cannot be made certain; and so if a lease be for years till A. be promoted to a benefice. (*k*)

But although in these cases, the demises as leases for years, may be void; (*l*) yet, they may operate as leases at will, or from year to year, and the instruments be given in evidence as proof of the rent, and other terms on which the lands are held, and there seems no good reason why they might not be good as leases for two years, as in cases of leases of years, without any number being stated, as after mentioned. (*m*)

If a man make a lease for twenty years, if A. so long live;

(*h*) Bac. Abr. *Leases*, (L) 3.

(*i*) *Ibid.* Shep. Touch. 275.

(*k*) Shep. Touch. 275. But if livery of seisin were made with such uncertain leases, they would

be good estates for life. Shep. Touch. *ub. sup.*

(*l*) 6 Co. 36.

(*m*) *Vide* P. 121.

or if A. be parson of Dale for so long;—here, as the term is defined, the lease is good, although liable to be destroyed upon the death of A. in the one case, or his ceasing to be parson in the other. (m)

So, if A. have a piece of land of the value of 20*l.* *per annum*, and make a lease of it to B. until he shall levy out of the profits thereof 100*l.*, this is void as a lease for years. But if A. have a rent-charge of 20*l.* *per annum*, and let it to B. until he shall have levied 100*l.*, this is a good lease for five years. (n)

And if a lease be made to A. for so many years as A. hath in the manor of Dale, and A. have then a lease for ten years in that manor; this circumstance ascertains the term intended to be granted, and the lease will be good for ten years. (o)

So, if a lease be made during the minority of J. S., or until J. S. shall come to the age of twenty-one, this is a good lease; for a reference to the age of J. S. will reduce the term to a certainty. (p) But if a lease be made to A. till a child in *ventre sa mere* shall come to the age of twenty-one years, this is void. (q)

Where a lease is made to two for forty years, if they so long live, this will determine by the death of one of them, because their life is but a collateral condition and limitation of the estate, which is broken when one dies: this differs therefore from a lease to two persons for their lives; for that gives an estate to both for their lives, and both have an estate of freehold therein in their own right, which consequently cannot determine by the death of one of them; for then the other could not be said to have an estate for his life, as the lessor at first gave it. (r)

When leases shall determine;

(m) Shep. Touch. 274, 275.

(n) *Ibid.*

(o) *Ibid.*

(p) That is to say, will show with certainty what was the intention of the parties; but *non constat* that

J. S. will ever come to the age of twenty-one.

(q) *Ibid.*

(r) Bac. Abr. *Leases*, (L) 4. See *vide* Daniel v. Waddington, 1 Rol. Rep. 309.

So, where one made a lease for forty-years, "if his wife, or any of their issue, should so long live: it was adjudged that the lease was not determined by the death of one of them, but should continue till all were dead, by reason of the disjunctive *or*, which goes to and governs the whole limitation; but if the words had been "if his wife *and* issue should so long live," there clearly, by the death of any of them within the forty years, the term had been at an end, by reason of the copulative *and*, which joins altogether, and makes their joint lives the measure of the estate. (r)

By a lease made between A. and B. of the one part, and C. of the other part, reciting that A., one of the lessors, was an original lessee for the term of his natural life, and B. the other, a person to whom A. had granted a lease for a term of years certain, seven of which would remain unexpired on the 29th of September then next, A. and B. demised to C. *habendum* from the said 29th Sept. for and during *the two several terms* therein before mentioned, *if C. should so long live*, and the term of A. should so long continue. Under the lease there was a memorandum subscribed, providing that the rent reserved should be paid, during the first seven years to B. and afterwards to A. during the term of thirty years, if his interest should so long continue; and that C. *his executors, administrators, and assigns* should have liberty to quit a part of the premises demised at any time during the term, upon giving twelve months' notice.—It was held that the lease and the memorandum must be taken together, and construed as one entire instrument; (s) and that the intention of the parties, expressed in the latter, so governed the former, as to extend the *habendum* beyond the term of the life of C. giving him a lease for thirty-seven years, determinable only on the death of A. (t)

A lease was made for twenty-one years, if the lessee lived

(r) Bac. Abr. *Leases*, (L) 4.

(t) Weak dem. *Taylor v. Escott*,

(s) But see *Goodright v. Mark*, 9 Price, 595.
infra, p. 124.

so long, and continued in the lessor's service; the lessor died, and the question was, whether the term were determined? Three of the justices held, that the lease continued; for it was not by the *laches* of the lessee that he did not serve any longer, but by the act of God: but the fourth was strongly against it; because it was a limitation to the estate that it should not continue longer than the lessee should serve. (u)

A lease for so many years as J. S. shall name is good, when J. S. has named the number of years; but a lease for such a term as both *parties shall please* is no more than a lease at will; because what that term shall be is utterly uncertain, and the pleasure of the parties seems to be limited to attend the continuance as well as the commencement thereof. (v)

It has been already stated, that where a demise is made, (without livery of seisin) for an unlimited time, this will operate as a tenancy from year to year. (w) And where lands, the greater part of which were enclosed, but some of which were in an open common field, were taken generally by parol at an annual rent, and a custom was proved in the parish, that where any tenant took a farm, in which there was an open field land more or less, for an uncertain term, it was considered as a holding from three years to three years; it was determined that the custom could not prevail, and that this was only a holding from year to year. (x)

when there is
no time specified,

A lease *for years* without any number being stated, is a lease for two years certain; because for more there is no certainty, and for less there can be no sense in the words. (y)

or the demise
is "for years,"

So a lease for a year, and so from year to year, is a lease

(u) *Wrenford v. Gyles*, Cro. Eliz. 643.

(x) *Roe dem. Bree v. Lees*, Bl. Rep. 1171.

(v) *Bac. Abr. Leases*, (L) 3.

(y) *Bac. Abr. Leases*, (L) 3.

(w) *Supra*, p. 8.

or "for a year, and so from year to year," for two years certain, and afterwards at will, or rather from year to year; for after a year has commenced, it must run out, and cannot be determined till the end. (x)

But a lease for one year, *and so for two or three years, or such term as the parties should think fit*, was held to be a lease for one year only, in the absence of any subsequent agreement. (a) And where lodgings were taken "*for twelve months certain, and six months' notice afterwards*," Lord Ellenborough, C. J., held this to be only a tenancy for one year; and that the tenant was at liberty to quit at the end of that period by giving six months' previous notice. (b)

Under a demise by a copyholder for one year, and at the end of that term from year to year for the term of thirteen years more, in all fourteen years, if the lord should grant his licence, and so as there should be no forfeiture; the licence is a condition precedent; and not being granted, the lease is no more than a demise from year to year. (c)

If the parties enter into an agreement for a lease of copyhold for thirty-one years, and by the custom of the manor the lord can only licence for twenty-one years, the tenant may be decreed to accept a lease of twenty-one years, with a covenant for a further lease of ten years, and a pecuniary compensation for the difference in value. (d)

And where the lessor demised certain freehold and copyhold lands at an entire rent, *habendum* as to so much as was freehold for twenty-one years, and so much as was copyhold

(x) *Stomfil v. Hicks*, 2 Salk. 413. *Bellasis v. Burbrich*, *ibid.* *Legg v. Strudwick*, *ibid.* 414. *Harris v. Evans*, 1 Wils. 262. *Birch v. Wright*, 1 T. R. 380. *Denn dem. Jacklin v. Cartwright*, 4 East, 31. It seems that in *Panton v. Shaw*, 3 Lev. 359, where a stable had been demised for a week, and so from week to week as long as both parties

should please, it was considered as a demise for three weeks.

(a) *Harris v. Evans*, Amb. 329.

(b) *Thompson v. Maberley*, 2 Camp. 573. And see *Wilson v. Abbott*, 3 B. & C. 88.

(c) *Lufkin v. Nunn*, 11 Ves. 170.

(d) *Hanbury v. Lichfield*, 2 Myl. & K. 629.

for three years, (warranted by the custom,) and covenant for renewal of the lease of the copyhold every three years *toties quoties*, during the twenty-one years, under the like covenants; and that in the mean time, and until such new leases should be executed, the lessor should hold the said land as well copyhold as freehold; it was holden that this was a lease of the copyhold for three years only; and that the lessee could not retain possession of the land after the expiration of that term, his remedy being upon the covenant. (e)

If a lease be made for seven, fourteen, or twenty-one years, it is in the option of the lessee, (and not of the lessor) at which period the lease shall determine, (f) and such a lease is good for the fourteen or twenty-one years, though formerly this was doubted: (g) so also the case (h) in which it was held that a lease made in 1785 for three, six, or nine years, *determinable in* 1788, 1791, and 1794, was a lease for nine years, determinable at the end of three or six years, *by either of the parties*, upon reasonable notice to quit, is now exploded.

or for a certain number of years determinable at an earlier period,

Where, however, there was a lease of lands by indenture for twenty-one years, with a proviso that it should be determinable by the lessee *or the lessor* at the end of the first seven or fourteen years; although there was a memorandum, indorsed and dated six years after the execution of the lease, "of its having been agreed between the parties *previously* to the execution, that the lessor should not dispossess, nor cause the lessee to be dispossessed of the said estate, but to have it for the term of twenty-one years from this present time;" which memorandum was signed by the parties, and stamped with a lease stamp, but not sealed: it was held that the lessor might determine the lease at the end of the

(e) Fenny dem. *Eastham v. Child*, 2 M. & S. 255, cited *supra*.

17 Ves. 363.

(f) *Dann v. Spurrier*, 3 Bos. & Pul. 399, 442. *Doe dem. Webb v. Dixon*, 9 East, 15. *Price v. Dyer*,

(g) In *Ferguson v. Cornish*, Burr.

1032.

(h) *Goodright dem. Hall v. Richardson*, 3 T. R. 462.

first fourteen years ; for the memorandum did not operate as a new lease and surrender of the first lease. (s)

Where a house was hired at twenty guineas a-year, the rent to be paid weekly, with a proviso that either landlord or tenant should be at liberty to determine the tenancy at three months' notice from any quarter day, such proviso did not prevent it from being a yearly tenancy. When the tenant entered, he was *in* of the whole estate for a year, liable to a defeasance on a particular event. (k)

or for a longer time than the lessor is possessed of.

If a person, having an interest for three years only, make a lease for five years, this will be a good lease for the three years ; for though the lessor *exceed* his authority, still the lease is only void for the excess. (l)

And if A., having a lease of land for one hundred years, make a lease to B. for forty years, to begin after A.'s death, this is a good lease for the whole forty, if there be so many to come at the time of the death of A. : or if the underlease be for one hundred years to begin after his death, this will be good for as many of the first hundred years as shall be unexpired at the time of his death. (m)

A lease, after being defeated, may sometimes revive.

It has been already stated, that though it is necessary that the continuance of the term should be defined, yet the lease will not be bad on account of its being liable to be destroyed upon the occurrence of some anticipated event. In some cases a lease may be defeated and cease for a time, and then revive and be in existence again ; as in the following instances put by Sir Edward Coke :—

“ If tenant in tail make a lease for years, reserving twenty shillings, and after take a wife and die without issue ; in this

(i) Goodright dem. of Nicholls & C. 551.

against Mark, 4 Maule & Selw. 30 ; *sed vide* Weak v. Escott, *supra*, p. 120.

(l) Bedford v. Dendien, Bull. N. P. 106.

(m) Shep. Touch. 274.

(k) Rex v. Herstmonceaux, 7 B.

case, as to him in reversion, the lease is merely void : but if he in reversion endow the wife of the tenant in tail of the land, as to the wife, it is revived again. So if tenant in tail make a lease for years rendering rent, and die without issue, his wife *enseint* with a son, and he in reversion enter, in this case as against him, the lease is void; but after the son is born, the lease is good again if it be within the statute. So if tenant in fee-simple take a wife (prior to the 1st of January, 1834,) and then make a lease for years and die, and the wife is endowed; in this case she shall avoid the lease, but after her decease the lease shall be in force again. (*n*)

III. THE REDDENDUM.

The *reddendum* settles the reservation of the rent. Its office usually is to define, 1. What rent shall be paid; 2. To whom it shall be paid; 3. At what time it shall be paid; 4. How it shall be paid; 5. Where it shall be paid.

1. A rent is a *certain profit issuing yearly out of lands and tenements corporeal*. (*o*) It is not necessary that it be reserved in money; for the reservation may be the delivery of horses, capons, roses, spurs, wheat, or the like; (*p*) so it may consist of the personal service of the lessee, in labouring or journeying for the lessor at certain stipulated times: (*q*) but it cannot be of part of the profits demised, as the herbage or vesture of the land, for that would be an exception out of the grant, not a *rent* reserved. (*r*)

The rent must issue out of corporeal tenements;

A rent must be certain, or at least capable of being reduced to a certainty; (*rr*) and therefore a demise, rendering be certain,

(*s*) Co. Lit. 46. a. Shep. Touch. 275.

(*q*) *Ibid.* Lanyon v. Carne, 2 Saund. 165.

(*o*) Co. Lit. 144. 2 Bl. Com. 41.

(*r*) Co. Lit. 47. a. 142. a. 2 Bl. Com. 41.

(*p*) Co. Lit. 142. a.

(*rr*) Co. Lit. 142. a.

rent *after the rate of 18l. per annum*, was adjudged to be void. (*s*)

and issue
yearly,

It must issue *yearly*; though it need not be payable every successive year, but may be reserved either annually, or every second or third year. (*t*)

It must issue out of lands, and such things as are capable of livery and may be distrained upon; and in general cannot be *reserved* out of any thing lying in *grant*. (*u*) It may, however, be reserved out of a demise of the herbage of land; and in like manner out of the grant of a reversion or future interest, for the possibility that these may come into possession. (*v*) It cannot be reserved out of incorporeal hereditaments; as out of commons, advowsons, offices, or the like; (*w*) tithes, (*x*) or the like, nor out of mere privileges or easements, (*y*) nor out of personal chatels; and where chattels are demised with land, the whole rent shall issue out of the land. (*x*) But a grant of rent, in respect of things incorporeal, or personal property, may operate as a personal contract, and so be binding upon the grantor. (*a*)

Whether rent could at common law be granted by parol, or whether it was necessary to make the reservation by deed, depended entirely upon feudal principles.

Division of
rents.
Rent service.

Rents were, at common law, either rents *service*, rents *seck*, or rent *charges*. Rent service was composed of homage, fealty, or other service, and a certain pecuniary or valuable return. The law gave to the lord, to whom this

(*s*) Parker v. Harris, 4 Mod. 78. S. C. 1 Salk. 262.

(*t*) Co. Lit. 47. *a*. But according to *Blackstone* it ought to be reserved *yearly*. 2 Com. 41.

(*u*) Co. Lit. 47. *a*. 142. *a*.

(*v*) Co. Lit. 47. *a*. 142. *a*.

(*w*) *Ibid*.

(*x*) *Sed vide* 5 Geo. III. c. 17, as

to Leases of Tithes by Ecclesiastical Persons, *supra*, p. 14.

(*y*) Buzzard v. Capel, 8 B. & C. 141, affirmed in the Exchequer Chamber in Trinity Term, 1829.

(*z*) Spencer's case, 5 Rep. 17. *b*. Emott v. Cole, Cro. Eliz. 255. Newman v. Anderson, 2 N. R. 224.

(*a*) Co. Lit. 47. *a*.

rent was due, the summary remedy of distress upon his tenant's land; and before the statute of *quia emptores*, when every feoffee held of his feoffor and yielded his services to him, as a feoffment might be made without deed, so a rent service might be reserved upon the feoffment without deed; the law allowing the remedy of distress as an incident to the render of *service*. (a) But other rents, with which no ser- Rent seck.
vice was coupled, had no such remedy of distress attending them by the law: and when, therefore, these were granted out of lands by deed (and by deed only could they be granted) as the law gave the grantee no remedy by distress, such rent was called rent *seck*. But as it was competent to Rent charge.
the parties by convention between themselves to affix to it the remedy which it wanted by mere force of law, a clause for a distress was frequently inserted in the grant; and the land being thereby charged with the rent, the rent seck became a rent charge. It seems, therefore, that before the statute of *quia emptores*, the broad distinction lay between rents-service, and rent either *seck* or charged on the land: rent-service being the return which the tenant made to his lord; the other species being a yearly payment granted out of certain land, and not recoverable by distress, unless by the particular agreement of the parties. (b)

But the statute of *quia emptores* made a very material alteration in the nature of rents; for that statute having abolished all intermediate tenures, and the reversion of every fee being by the feoffment divested out of the feoffor, and transferred to the original lord of the same fee, the fealty and rent, as incident thereto, were likewise transferred. The fealty was always inseparably incident to the reversion; and therefore never could be lost to the ultimate lord. But the rent, though generally incident to the reversion, might at the will of the feoffor, be severed from it, and reserved to the feoffor himself, provided such reservation were by

(a) Lit. ss. 213, 214, 215, 216, (b) Lit. ub. sup. Co. Lit. 143. b.
217, 218, 226, 227.

deed. (c) But the fealty being now severed from the rent, the remedy by distress, which was only given in respect of the fealty, become lost to the feoffor; and, therefore, such rent stood precisely in the same situation as other rents before the statute; and could only be distrained for, by being charged upon the land by a special clause in the deed of reservation. Where, therefore, a man aliens all his estate, and leaves no reversion in him, as if tenant in fee make a feoffment, or tenant for life alien his life estate, no rent can, properly speaking, be reserved, except it may operate as a grant by deed. On the other hand a lease for years not being an alienation of the freehold, but a mere contract for a temporary enjoyment of the land, a rent might well be reserved by *parol* upon such a contract. (d) With respect, however, to the remedy by distress, these distinctions, nice as they may appear until the principles out of which they grew be examined, are now of little consequence; for the statute 4 Geo. II. c. 28, has made every kind of rent recoverable by distress. (e)

For all of which a distress may now be made by stat. 4 Geo. II. c. 28.

How rent may be reserved.

For the reservation of rent the technical form of the *reddendum* is by no means necessary. *Reserving, rendering, yielding, paying, &c.*, are words by which rent may be reserved. (f) So a demise, *provided the lessee pay such a rent; or in consideration of the rent aftermentioned* will be

(c) Co. Lit. 143. b.

(d) Year Book, 40 Edw. III. 34.
a. 2 Edw. IV. 11. Lit. *ub. sup.*

(e) Rents are also called *Fee-farm rents*, when reserved out of an estate aliened in fee, which must have been prior to the statute of *quia emptores*. Vide Co. Lit. 154. a. n. (5) and Dougl. 627. n. (1). *Quit-rents*, when fealty or other service is excused by their payment. *Rack-rents*, when they amount to about the annual value of the premises demised. *Rents of assize*,

when they are assized by the lord, and reduced to a certain equality among his tenants, whether issuing out of freehold or copyhold lands. So they were formerly called *White rents*, when paid in silver; and *Black mail*, when paid in baser coin, &c. See further as to the several kinds of rent, Com. Dig. *Rent*. (C).

(f) Co. Lit. 47. a. *Ibid.* 141. b. *Giles v. Hooper*, Carth. 135. *Porter v. Swetnam*, Style, 406, 431. 1 Wms. Saund. 232. n. (1).

a good reservation; (g) and if it be reserved *provided the lessee pay so much yearly*, this will be intended to mean every year during the term. (h)

Where rent is reserved *generally* by the lessor, (without saying to him, his heirs, &c.) it will follow the nature of the lessor's interest, and if he have an estate of freehold will, after his death, go to the heir; if he have only a chattel interest, to the executor or administrator. (i) To whom.

According to some old authorities, if the lessor demises, rendering rent *to himself*, or to *himself and his assigns*, without saying "to his heirs," &c., this reservation, shall be good *for his life*; but the rent shall cease at his death, (k) or, if having a freehold, he make the reservation to *him, his executors, or administrators*, (l) or if it were in the disjunctive, as to him or his heirs. (m) These cases are only to be distinguished from those in which the reservation is made generally, on the maxim *expressio unius est alterius exclusio*; and it may be doubted whether at the present day the opinion of *Lyttleton* would not prevail, that the rent was in such cases annexed to the reversion; (n) and whether the Courts would not now

(g) 2 Rol. Abr. 449. l. 33, 40. Dennis v. Henning, Owen, 151. Drake v. Munday, Cro. Car. 207. And see Gealin v. Warburton, 1 Leon. 137, and Morrice v. Antrobus, Hardr. 325.

(h) Harrington v. Wyse, Cro. Eliz. 486. Moore, 459.

(i) Knolles's case, Dyer, 5. b. Anon. Dyer 45. a. b. Sacheverell v. Frogatt, 1 Ventr. 162. Sury v. Brown, Latch 99. Crispe v. Frier, 2 Rol. Abr. 450. l. 38.

(k) Anon. Dyer, 45. a. Co. Lit. 47. a. 2 Rol. Abr. 450. l. 24. Per Moyle, J.; contra Littleton, J. Year Book, (49 Hen. VI.) 10 Edw. IV.

18. b. Wooton v. Edwin, note (l).

(l) Richmond v. Butcher, 2 Rol. Abr. 450. l. 27. S. C. Cro. Eliz. 217. Owen 9. Sury v. Cole, Latch, 44. Wooton v. Edwin, Latch, 274. S. C. 12 Rep. 36, where the editor observes, "This case will scarcely be allowed for law at this day."

(m) Co. Lit. 214. a. Mallory's case, 5 Rep. 112. S. C. (Pain v. Malory,) Cro. Eliz. 832. And see Oates v. Frith, Hob. 130, and Bland v. Inman, Cro. Car. 288. S. C. Sir W. Jones, 308. Godb. 448.

(n) Vide supra, note (i), and see Serj. William's note to Saunders's Rep. vol 3, p. 368. n. (2).

refuse to countenance a distinction "with so narrow a difference." (o)

It has, indeed, been frequently decided, that upon a demise for years, reserving rent to the lessor, *during the term*, without any mention of his heir, it should nevertheless go to his heir, because the expression, *during the term*, shewed the lessor's intention that the rent should be payable to the proper person after his death. (p) And it was said by Lord Hale in *Sacheverell v. Frogatt*, that if lessee for one hundred years make a lease for fifty years, rendering rent to him and his heirs, *during the term*, it shall nevertheless go to the executor or administrator; or if the lessor devise the reversion it shall go to the devisee; (q) and there can be little doubt that the old cases, before noticed, would not now be considered as law.

Where tenant in tail to him and the heirs male of his father demises for years, and reserves the rent to him and his heirs, the rent shall go to the heir male of the body of his father, though he be not heir to the lessor. (r) And so where tenant for life, with power to make leases, demises, reserving rent to him and his heirs, the rent shall go to the remainder man or reversioner upon the death of tenant for life. (s)

Usual practice
of reservation.

In practice it is usual to make the reservation general, without saying to whom, so as to avoid these nice distinctions. (t)

(o) It was long since so designated by Willoughby, J. and Jenney, J. See Dyer, 45. b. and Wms. Saunders *ub. sup.* note 3.

(p) *Sacheverell v. Frogatt*, 3 Saund. 367. S. C. 1 Ventr. 148. 161. Sir T. Raym. 213. 2 Lev. 13. 2 Keb. 798, 819, 833, 839. (It appears by this case that *Richmond v. Butcher*, *ub. sup.* was decided upon a mistake.) *Sury v. Brown*, Latch, 99. S. C. 3 Bulstr. 328. See

also the arguments in *Sury v. Cole*, Latch, 255, 264. Palm. 481; and the judgment, stated in 3 Saund. 370.

(q) *Sacheverell v. Frogatt*, *ub. sup.*

(r) *Cother v. Merrick*, Hardr. 91. 1 Ventr. 162.

(s) *Whitlock's case*, 8 Rep. 138. *Isherwood v. Oldknow*, 3 M. & S. 382.

(t) See *Whitlock's case*, 8 Rep. 138.

The rent cannot be reserved to a stranger, *(t)* for there is no privity between them. Therefore where the lessor reserves rent to himself *and his wife*, though this will be good for his life, yet after his death, the wife, being a stranger, shall not have the rent, *(u)* except where in the case of copyhold lands, she is entitled to her free bench, when she shall have the rent as incident to the reversion. *(v)* So where a demise was made rendering rent to the lessor, and after his death to his son, not naming him *heir*, it was held that the heir should not have the rent. *(w)* For the same reason it is said that a lease reserving the rent, not to the lessor, but to his heir, will be bad. *(x)* But if a man seised of a freehold make a lease for a term of years, to commence after his death, rendering rent to his heir, this reservation will be good. *(y)* And a man may reserve one rent to himself for his life, and another to his heir. *(z)* And where two joint-tenants make a lease by deed, reserving rent to *one* of them, this is good enough to him to whom the rent is reserved, because he is privy to the lease, and not a mere stranger. *(a)*

Not to a stranger.

But although rent as such cannot be reserved to a stranger, yet the reservation may be good, as a sum in gross, for which covenant will lie. *(b)* And if the reservation be to a stranger, who is no party to the deed, yet the party to the deed with whom the covenant to pay is entered into, may maintain an action for breach of the covenant. *(c)* But no action of covenant will lie by a stranger, for whose benefit the covenant is entered into with a third person, *(d)* although

But may be good as a sum in gross.

(t) Lit. s. 346. Co. Lit. 47. a. 213. b. and n. (1), 214. a. n. (1),
Ibid. 143. b. 19 Vin. 108, 109. and 2 Saund. 368. n. (2), (3), 370.
Cole v. Sury, Latch, 264, unless in n. (5), 371. n. (7).

the case of the king. Co. Lit. *ub. sup.*

(u) 2 Rol. Abr. 447. l. 33. *Ibid.* l. 45.

(v) *Hill v. Hill*, cited Palm. 482. See Moore, 876, and 1 Ventr. 163.

(w) *Oates v. Frith*, Hob. 130.

(z) Co. Lit. 99. b. 213. b.

(y) *Oates v. Frithe*, 2 Rol. Abr. 447. l. 8. And see Co. Lit. 99. b.

(z) Co. Lit. 214. a.

(a) Lit. s. 346.

(b) See *Frontin v. Small*, Stra. 705. 1 Ld. Raym. 418.

(c) See *Deering v. Farrington*, 1 Mod. 113.

(d) *Ex parte Richards*, 14 Ves. 187. *Barford v. Stuckey*, 2 B. & B. 333. 8 Moore, 88.

it seems he might maintain an action of assumpsit on the promise. (e)

The rent follows the nature of the land demised.

The rent, being incident to the reversion, will follow the nature of the land out of which it is reserved: as if a man, seised as heir on the part of his mother, demise land rendering rent to him and his heirs, it shall go to the heir *ex parte maternâ*. (f) So rent reserved out of lands holden in *Gavelkind*, or *Borough English*, shall follow the nature of those tenures. (g) If two joint-tenants let by deed poll or parol, rendering rent to one, it shall go to both, (h) but otherwise, if it be by indenture, for then it shall be good by estoppel. If two joint-tenants lease by deed to A. rendering 10*l. per annum*, and only one seal the deed, the demise shall be but of a moiety rendering only 5*l. per annum*. (i) And if one joint-tenant make a lease for years, and die, this will be binding on the survivor, but the rent shall not go to the surviving joint-tenant, who is in by a paramount title. (k) Nor can the heir of the deceased lessor have it, because he has no reversion or interest in the land, (l) but the executor or administrator of the lessor might, it should seem, maintain an action of debt or covenant either upon the covenant in law, or upon the express covenant, if there be any. (m)

Tenants in common, where they join in a lease reserving an entire rent, *may* join in enforcing the payment of it; but if there be a separate reservation to each, each *must* bring a separate action. (n)

Where a husband is possessed of a *term of years* in right of his wife, and demises rendering rent, the rent after his

(e) *Vide* Pigott v. Thompson, 3 Bos. & Pull. 147, and the cases there collected in note a.

(f) Cother v. Merrick, Hardr. 94.

(g) *Ibid.*

(h) Co. Lit. 47. a.

(i) Bond v. Cartwright, 2 Rol.

Abr. 453. l. 32.

(k) Co. Lit. 185. a. (n).

(l) Clerk v. Turner, 2 Vern. 323.

Dyer, 187. a.

(m) 4 Bac. Abr. 131.

(n) Powis v. Smith, 5 B. & A.

850.

death shall go to his executor, and not to his wife, it being a reduction into possession *pro tanto*. (o) And where an administrator of a term for one hundred years made a lease for five years, rendering rent, it was adjudged that, though the reversion should go after his death to the administrator *de bonis non*, yet the rent should go to his executor, and be assets in his hands to answer the debts of the intestate. (p)

Rent may, by agreement, subsequent to the lease, be made by relation, payable from the beginning of the lease. (q)

Rent by agreement subsequent.

An agreement was entered into, dated the 8th of September, for a lease for seven years, the *first quarter's* rent to be paid on the *25th of March*; it was held, that at Lady-day a quarter's rent *only* was due, and that the payment of the first quarter's rent to Christmas was postponed to the end of the lease. (r)

The Courts will struggle to do justice between lessor and lessee, and therefore where a lease was granted on the 21st of March, 1828, *habendum* for seven years, from the 25th of March, then instant, wanting seven days, at a yearly rent of 28*l.*, payable quarterly on the 25th March, 24th June, 29th Sept., and 25th Dec. in every year, commencing from the 25th of March then instant, and the lessee covenanted that he would pay during the continuance of the term on the days aforesaid. In an action for breach of covenant by the lessor for non-payment of the last half-year's rent, the lessee having paid one quarter's rent into Court, demurred generally to the sufficiency of the alleged breach of covenant in respect of the last quarter's rent, alleging that it did not become due *during the term*. The Court overruled the demurrer, on the ground

(o) Co. Lit. 46. b. *Drew v. Bayly*, Harvey,) 1 Ventr. 259. 3 Keb. 298, 2 Lev. 100. See Loftus's case, Cro. 549.

Eliz. 278.

(q) *M'Leisch v. Tate*, Cowp. 781.

(p) *Drew v. Bayly*, *ub. sup.* and cited 1 Vern. 94. S. C. (*Norton v.*

(r) *Hutchins v. Scott*, 2 Mees. & W. 809.

that the first quarter's rent might be considered as payable before hand, viz., on the 25th of March, 1828, so that all the seven years' rent would be payable during the term. (s)

How to be
computed.

Where there are special days of payment limited in the *reddendum*, the rent ought to be computed according to the *reddendum*, and not according to the *habendum*; but where the reservation is general, as half-yearly or quarterly, and no special days are mentioned, there the half-year or quarter must be computed according to the *habendum*. (t)

IV. THE CONDITIONS.

A condition

is 1. either
precedent,

or subsequent;

2. in law or
in deed.

After the *reddendum* usually follow the conditions. A condition is defined to be "a quality annexed by him that hath estate, interest, or right, to the same, whereby an estate, &c., may either be defeated, or enlarged, or created, upon an uncertain event." (v) It is unnecessary in this place to advert to conditions *precedent*, or those upon which an estate may come into *esse*. (w) But conditions *subsequent*, which may either defeat or enlarge the estate granted, are frequently inserted in leases, and therefore require some attention. Conditions, according to Littleton, are of two sorts; conditions *in law*, and conditions *in deed*. Conditions in law, which are now more usually termed *limitations*, are where a contingency is limited in the grant of the estate, the happening of which shall *ipso facto* put an end to it. As if an estate be made to A. for years, if J. S. so long live; this is a conditional limitation; and the estate of A. will cease immediately upon the death of J. S. So if an estate be granted to a man and his wife during coverture, they have an estate

(s) Hopkins v. Helmore, 3 Nev. & P. 452.

(t) Tomkins v. Pinsent, Lord Raym. 819. S. C. 7 Mod. 97.

(v) Co. Lit. 201. a.

(w) See as to conditions *precedent* Bac. Abr. *Conditions* (I). Shep. Touch. 133.

for their two lives, liable to become extinct upon the dissolution of the coverture. And where several estates are thus limited one after another, the next subsequent estate becomes immediately vested upon the determination of the first; and the remainder-man may thereupon enter. (*x*) But a condition in deed is merely a *proviso* that the grantee shall, or shall not, do a particular act; the breach of which will not *ipso facto* defeat the estate, but will only give power to the grantor, his heirs or assigns, to re-enter, and by such re-entry to avoid the estate. (*y*)

Some conditions are *implied* in the very relation of landlord and tenant, without the insertion of any particular words: such as that the tenant shall not create a greater estate than he received from the grantor; for if tenant for life make a feoffment, this is a forfeiture. So, if a man have an office by grant, the law tacitly annexes a condition that he shall duly execute his office. (*z*)

3. implied or expressed.

Conditions expressed are such as are set down by the agreement of the parties at the time of granting the estate; for every grantor has the power of affixing such legal condition to his grant as he may think proper. (*a*) The conditions must be affixed at the time of creating the estate which they are to affect, and not at a subsequent period. Conditions are most properly made by deed; for a condition to defeat an estate of freehold cannot be shewn in pleading, unless it be by deed, though it is otherwise of chattel interests; (*b*) but they may be inserted in or indorsed upon the same deed as creates the estate, or in another distinct from the deed of creation, provided it be made at the same time. (*c*)

(*x*) Lit. s. 325, 380. Co. Lit. 214.
b. Mary Portington's case, 10 Rep. 41. Shep. Touch. 117.

(*y*) *Ibid.* Co. Lit. 214. *b.* Statute 32 Hen. VIII. c. 34.

(*z*) Lit. s. 378. Co. Lit. 233. *b.*

(*a*) Lord Cromwell's case, 2 Rep. 71. *b.* Roe dem. Hunter v. Galliers,

2 T. R. 133.

(*b*) Lit. s. 365. Potter v. Oldreeme, 1 Rol. Abr. 413. l. 18.

(*c*) Griffin v. Stanhope, Cro. Jac. 456. 1 Rol. Abr. 413. l. 9. See Goodright dem. Nicholls v. Mark, 4 M. & S. 30.

No particular words are necessary to create a condition.

The words ordinarily used to make a condition are, "*upon condition*;" "*provided that*;" (*d*) and where land was let "*provided always, and it is further covenanted*;" and a question was made, whether or not this was a good condition to defeat the estate, it was decided in the affirmative; and *Periam, J.*, said, "*Proviso* always implies a condition, unless there be subsequent words which may change it into a covenant; as where there is another penalty annexed to it for non-performance; but it is a rule in provisos, where the proviso is that the lessee shall perform or not perform a thing, and no penalty is affixed, then this is a condition; but if a penalty be affixed, then it is a covenant:" to which the other justices agreed. (*e*) But where the proviso follows a covenant, and is obviously only intended to limit the generality of the covenant, there is no condition to defeat the estate; as where the lessor covenanted that it should be lawful for the lessee to cut under-wood, provided, and the lessee covenanted, that he would not cut timber trees. (*f*) These technical distinctions may, however, frequently lead the judgment astray; and therefore it seems always the safest method to have recourse to the apparent intention of the parties to ascertain whether particular words constitute a condition, or a covenant.

Impossible conditions are void.

A condition that is impossible at the time of its creation, or afterwards becomes so by the act of God, or which is contrary to law, or repugnant to the nature of the estate granted, is altogether void, and the estate is *absolutely* vested in the lessee. (*g*)

Infants and femes covert are bound by conditions.

If an estate be made to a feme covert, or an infant, with

(*d*) *Simpson v. Titterell, Cro. Eliz. 242.*

(*e*) *Ibid.*

(*f*) *Hannington v. Holland*, cited in *Sir Henry Berkeley v. Earl of Pembroke, Moore, 707.*

(*g*) *Co. Lit. 206. a. Stewkley v.*

Butler, Moore, 880. Scovel v. Cabel, Cro. Eliz. 107. And see 12 Ves. 504. If the condition precedent be impossible or illegal, and consequently void, the estate can never rise. Co. Lit. 217. Shep. Touch. 133.

a condition in deed affixed to it; they will be bound by the condition. (*h*)

A condition in deed may be taken advantage of by the heir, though he be not named: (*i*) but a power of re-entry for breach of condition cannot be reserved to a stranger, even by express words. (*k*) Therefore, where a lease was made by a trustee, reserving a right of entry upon breach of covenant to *cestui qui trust*, it was held that, as the legal estate was in the trustee, such reservation was void. (*l*)

The heir may take advantage of a condition, but not a stranger.

A party shall never take advantage of his own wrong to avoid the performance of a duty: (*m*) therefore, where there is a proviso in a lease that upon non-payment of rent, or non-performance of the covenants by the lessee, the term shall cease, the lessor, and not the lessee, has the option of determining the lease upon any such default. (*n*)

Party shall not take advantage of his own wrong.

V. THE COVENANTS.

Next in order usually come the covenants. A covenant in its strict legal acceptation is an agreement between two or more parties *in writing, sealed and delivered*; by which the covenantor binds himself to the covenantee either for the truth of some existing circumstance, or for the future performance or non-performance of some particular act. (*o*)

Nature of a covenant.

1. Covenants are either, 1. such as run with the land; or,
2. such as are merely personal.

Division of covenants.

(*h*) Co. Lit. 233. Rol. Abr. 421.
l. 33.

(*i*) 1 Ves. 46.

(*k*) Lit. s. 347. See as to nature of conditions (which form a very large head of law,) Com. Dig. Bac. Abr. and Vin. Abr. title *Condition*.

(*l*) Doe dem. Barber v. Lawrence, 4 Taunt. 23. Doe dem. Barnley v.

Adams, 2 Cro. & J. 232. 2 Tyr. 289. Doe dem. Barker v. Goldsmith, 3 Cro. & J. 674. 2 Tyr. 710.

(*m*) Co. Lit. 216.

(*n*) Reid v. Parsons, 2 Chitt. Rep. 247. Doe v. Bancks, 4 B. & C. 401.

(*o*) Shep. Touch. 160. 2 Bl. Com. 304. Platt on Covenants.

Running
with the land,

either in law,

or in deed:

1. A covenant running with the land is one which affects the nature, quality, or value, of the land demised, or the mode of enjoying it, independently of collateral circumstances. (*p*) These covenants are again divisible into covenants in law, and covenants in deed. A covenant in law is one which the law raises from particular words by which the relation of landlord and tenant is created, without any express stipulation on the part of the parties: thus where a man makes a lease by deed, the law implies a covenant on his part that he has a good title to convey, and that the lessee shall have quiet possession against all persons lawfully claiming title. (*q*) On the other hand, the law imposes upon the tenant the obligation to cultivate the lands in a proper and customary manner, and to keep the buildings in repair. (*r*) All such covenants, as they arise out of the very relation of landlord and tenant, of course run with the land. A covenant in deed, is that which is introduced by the act of the parties; and by this the covenants in law may be either enlarged, narrowed, or otherwise altered: as for example, the inherent covenant for quiet enjoyment against all persons claiming title may be enlarged by the lord's covenanting against disturbances *by all persons whatsoever*: or narrowed by his covenanting against the acts of such persons only as claim through him. An express covenant restrains an implied covenant, (*s*) as if in an underlease, the sub-lessee covenants to keep down the rent reserved in the superior lease, and the superior landlord distrains at the end of the first quarter of the under-lease, for one quarter's rent due under the superior lease; there will be no implied covenant on the part of the sub-lessor to indemnify his lessee, although the rent in the underlease is reserved yearly. (*t*) So, an express covenant against persons named,

(*p*) Spencer's case, 5 Rep. 16. 1st and 2d Resolutions.

(*q*) *Vide infra*.

(*r*) In order to raise an implied covenant in its strict sense, the lease must be by deed; but a lease by parol will also create certain obliga-

tions between the parties, which the law will enforce. The difference exists in the particular remedies applicable to either case. *Vide infra*.

(*s*) 2 Saund. 239.

(*t*) Upton v. Ferguson, 3 Moore & Sc. 88.

restricts an implied covenant under the word demise, (u) and an express covenant for quiet enjoyment restrains the whole of the implication in the word demise, which implies two covenants, *viz.* a covenant for title, and a covenant for quiet enjoyment. (v) So even one covenant in deed may be modified by another; for example, a covenant by which the grantors covenanted that they were seised of a good estate in fee simple, and had good right to convey, was held to be qualified and restricted by a subsequent covenant for quiet enjoyment, without let or interruption, *by them, their heirs or persons claiming under them.* (w) Covenants running with the land bind not only the covenantor during his lifetime, and his representatives after his death in respect of his assets, by privity of contract, but also every person who is in of any estate created by or growing out of the original demise, such person being affected by privity of estate. (x)

2. A personal covenant is one which does not affect the land demised, but is merely collateral to it. (y) Instead, therefore, of running with the land, and binding the persons entering into possession as assigns, it effects only the covenantor during his life, and the assets in the hands of his representatives after his death, by reason of the privity of contract.

II. Covenants are again either joint or several; or sometimes both joint and several.

Whether a covenant be joint or several depends upon the subject matter of the covenant, and the interest to pass

(u) *Merrill v. Frame*, 4 Taunt. 329.

(v) *Line v. Stephenson*, 4 Bing. 678. S. C. 5 Bing. 183, in Error.

(w) *Milner v. Horton*, 1 M'Clel. & Y. 647. *et vide* *Doe dem. Morecraft v. Meux*, 4 B. & C. 606.

(x) It is sometimes a question of some nicety whether a covenant do

or do not run with the land. In a subsequent part of this treatise where the nature of particular covenants is considered, most of those which run with the land are pointed out; *Vide infra*.

(y) *Spencer's case*, *ub. sup.* 2d Resolution.

or personal.

Covenants joint or several.

thereby. (z) And it has been laid down that “words, though never so joint, shall be taken severally, where they have a distinct subject matter to work upon, (a) and that though a covenant be joint in its terms, yet if the interests of the covenantees be several, each may sue separately for a breach.” (b)

Illegal covenants.

A covenant to do a thing which upon the face of it appears to be prejudicial to the public interest, or otherwise contrary to law, is *ipso facto* void. (c) And if a man covenant to do a thing which to-day is lawful, but to-morrow is by statute made unlawful, the covenant will be thereby extinguished; (d) or if he covenant not to do a thing, and then a statute is made which compels him to do it, the covenant becomes void; (e) but if he covenant to do that, which is afterwards made unlawful *in part* only, it must be performed as far it continues lawful: (f) and if he covenant not to do a thing, which, when he enters into the covenant is unlawful, and then a statute makes it lawful, this covenant will not thereby be repealed; (g) on the other hand, if he covenant to do a thing which is unlawful by statute, the covenant will not be made lawful by a repeal of the statute; because the covenant was void *in initio*; though it had been otherwise, had the covenant been originally lawful, and a

(z) *Slingsby's case*, 5 Rep. 18. *b. Anderson v. Martindale*, 1 East, 497. *Southcote v. Hoare*, 3 Taunt. 87.

(a) *Per Holt*, C. J. in 3 Ch. Rep. 69.

(b) *Withers v. Birchman*, 3 B. & C. 254. And *vide infra*, as to the joinder of parties in an action of covenant.

(c) *Shep. Touch.* 163. *Lowe v. Peers*, Burr. 2225.

(d) *Brewster v. Kitchell*, 1 Salk. 198. *Hesketh v. Grey*, Bull. N. P. 165. *Contr. Brason v. Dean*, 3 Mod. 39. Covenant on a charter-

party for freight: plea, that the ship was loaded with *French* goods prohibited by law to be imported: upon demurrer, the Court were of opinion that if the thing was lawful at the time when the defendant entered into the covenant, though it was afterwards prohibited by act of parliament, yet the covenant is binding. For aught that appears by the report, the statute might have passed after the day at which the covenant was to be executed.

(e) 1 Salk. 198.

(f) 2 Eq. Ca. Abr. 26.

(g) 1 Salk. 198.

statute had been passed to make it void, which statute had been afterwards repealed. (*h*)

A covenant to do a thing which is impossible is also void. (*i*) But then the impossibility must exist at the time of making the covenant; for if it be then possible, and afterwards become impossible, the covenantor will still be liable upon the express words of his covenant. (*k*) But where the event covenanted for may by possibility take place, the covenant will be valid; as if one covenant that it shall rain to-morrow, or that the Pope shall be at Westminster on a certain day. (*l*)

An impossible covenant.

When a deed is void, all the dependent covenants contained in it are also void. (*m*) Therefore where A. being possessed of a term of years granted so much of the term as should be unexpired at the time of his death; and the grantee assigned it to B., and covenanted that B. should enjoy against all persons; upon an action upon this covenant, it was held that the original grant being void for uncertainty, the covenants in the assignment which depended upon the grant, were also void, and judgment was given for the defendant. (*n*) And so where a lease was holden void to pass any interest in the land, a reservation of rent therein was holden to be void, because it depended upon the original lease. (*o*) But if any estate pass by the grant, though not the quantity intended to be conveyed, the covenant, though referring to the estate, shall stand though the estate be gone. (*p*)

Dependent covenants.

Where a covenant is distinct, and independent, not

(*h*) *Jaques v. Withy*, 1 H. Bl. 65.

(*i*) *Shep. Touch.* 163.

(*k*) *Paradine v. Jane*, Aleyn, 27. *Blight v. Page*, 3 Bos. & Pul. 295.

n. (*a*). *Barker v. Hodgson*, 3 M. & S. 267.

(*l*) 1 Rol. Abr. 420. l. 4. 8.

(*m*) *Soprani v. Skurro*, Yelv. 18.

(*n*) *Capenhurst v. Capenhurst*, Sir T. Raym. 27. S. C. 1 Lev. 45.

1 Keb. 164. But *query* as to this lease being void? *vide supra*, 89.

(*o*) *Frontin v. Small*, Str. 705.

Andrew v. Pearce, 1 New Rep. 158.

(*p*) *Evans v. Vaughan*, 4 B. & C. 261.

referring to the estate intended to be granted, nor attendant upon it, the covenant will be valid, though the grant be void to pass an estate. Where, therefore, the defendant by bargain and sale (*without enrolment*) granted to the plaintiff an estate, provided that if the grantor paid so much money, it should be lawful for him to re-enter, *and then the defendant covenanted to pay so much money to the plaintiff*, in an action upon this latter covenant it was objected that the bargain and sale not being enrolled, was void, (*quod fuit concessum*,) and that, therefore, the covenants contained in the grant were void; but Lord *Holt* distinguished the case from *Capenhurst v. Capenhurst*; because there the covenant for quiet enjoyment waited upon the estate, and no estate being granted, was void; whereas here the covenant to pay the money was a distinct, separate, and independent covenant, and it was immaterial whether any estate passed. (*q*)

And a legal covenant will not be avoided by an independent illegal covenant.

A distinct valid covenant will not be avoided by the insertion of an illegal covenant in the same instrument. (*r*) In a case in *Hobart* a distinction was taken between independent covenants, which are void at common law, and such as are void by statute: and it was said, that though the former would not prejudice other distinct lawful covenants, yet the latter would vitiate the instrument altogether. (*s*) But as this *dictum* occurred in the case of a bond to the sheriff contrary to the statute 23 Hen. VI. c. 9, which made such bond *altogether* void, it is probable the Court meant it to apply only to the case before them. At all events no such distinction exists at present. For where a tenant bound himself to pay the property-tax contrary to the statute 46 Geo. III. c. 65, s. 115, and *by a separate covenant* undertook to pay the rent clear of all parliamentary taxes, &c., generally, the Court held that such general words must be understood to mean such taxes as the tenant might lawfully

(*q*) *Northcote v. Underhill*, 1 land, Ley, 79.

Salk. 199. *S. C. Ld. Raym.* 388.

(*s*) *Norton v. Simmes*, *Hob.* 13.

(*r*) *Bishop of Chester v. Free-*

pay; and the covenants being distinct, the former would not vitiate the latter. (*t*)

And in a subsequent case, where the defendant after the passing of the statute, 46 Geo. III. c. 65, demised to J. S. certain premises, *reddendum* 40*l.* annually, clear of land-tax, property-tax, &c., and J. S. covenanted to pay the said yearly rent *in the manner the same was reserved to be paid as aforesaid, and to pay the land-tax, property-tax, &c.*; the Court of Common Pleas held that, though by the section 115, coupled with section 195 of the act, so much of the *reddendum* and covenant stipulated for payment of the rent clear of deduction on account of the property-tax, was void, the residue was good for the payment of the rent. (*u*)

In order to create a covenant, no particular form of words is necessary: (*v*) it may be inserted in any part of the deed; (*w*) and may be put in the form of a condition, an exception, (*x*) or even a recital. (*y*) Whether or not it be meant for a covenant is to be collected from the intention of the parties apparent upon the face of the deed. (*z*)

No particular words are necessary to make a covenant.

In an agreement for a lease containing no clause of re-entry, a clause was inserted stipulating, that the lessee

(*t*) *Gaskell v. King*, 11 East, 165. See also *Monys v. Leake*, 8 T. R. 411. *Mestaer v. Gillespie*, 11 Ves. 629. *Kerrison v. Cole*, 8 East, 231. *Wigg v. Shuttleworth*, 13 East, 87. *Howe v. Synges*, 15 East, 440. *Readshaw v. Balders*, 4 Taunt. 57.

(*u*) *Fuller v. Abbot*, 4 Taunt. 105. Where, however, a bond, &c. is made upon a consideration partly legal and partly illegal, as the consideration is entire, the bond, &c., will be altogether void. *Fetherston v. Hutchinson*, Cro. Eliz. 199. *Scott v. Gilmore*, 3 Taunt. 226. *Secus*, where the consideration is divisible. *Best v. Jolly*, 1 Sid. 38. *Brad-*

burne v. Bradburne, Cro. Eliz. 149. *Coulston v. Car*, *ibid.* 847.

(*v*) *Platt on Covenants*, 28. *Shep. Touch.* 162. *Stanton's case*, Moore, 135. *Pordage v. Cole*, 1 Saund. 319. *Lant v. Norris*, Burr. 290. *Williamson v. Codrington*, 1 Ves. 516.

(*w*) *Duke of Northumberland v. Errington*, 5 T. R. 526.

(*x*) *Holder v. Taylor*, 1 Rol. Abr. 518. l. 19. *ibid.* l. 41. *Bush v. Coles*, Carth. 232. *S. C. Salk.* 196, and see *Russell v. Gulwell*, Cro. Eliz. 657.

(*y*) *Barfoot v. Freswell*, 3 Keb. 465.

(*z*) 5 T. R. 526.

should give up any part of the land which the lessor might require for building on; (a) making a proportional abatement of rent. It was held, that this operated as a covenant only, and not in the nature of a condition for determining the lease on non-performance.

Usual covenants.

If an agreement for a lease contain no express stipulation respecting covenants, the lessor is entitled to usual covenants only. (b)

What are usual covenants in leases has been and still frequently is *verata questio*. (c) To determine this no rule of uniform application can be laid down; for reference must necessarily be had to the nature of the subject matter of the demise: covenants which would be usual and common covenants in a farming lease, would be most unlikely to occur in the lease of a house in London.

Covenants in restraint of trade, or to pay land tax or sewers' rate, not usual covenants.

Covenants in restraint of trade, are not in general to be considered usual covenants, (d) nor is a covenant to pay land tax or sewers' rate, which are usually paid by the landlord, but where a party contracted for an assignment of the lease of a *public-house*, which, in the agreement, was described as holden at a certain *net* annual rent, under *usual and common covenants*: and the lease contained a covenant by the tenant to pay land tax, sewers' rate, and all other taxes; and a proviso for re-entry, if any business but that of a victuallar should be carried on in the house; and it was proved that a considerable majority of public-house leases contained such a proviso; it was held that the covenant to pay land tax, &c., though in an ordinary lease, not a common covenant on the part of the tenant,

(a) Doe dem. Willson v. Phillips, 2 Bing. 13. 9 Moore, 46.

(b) Propert v. Parker, 3 Myl. & K. 280.

(c) As to the question, what are usual covenants? it is an endless

source of litigation. *Per* Mansfield, C. J., in Morgan v. Bissell, 3 Taunt. 73.

(d) Van v. Corpe, 3 Myl. & K. 269. Propert v. Parker, *ibid.* 280.

was a common covenant in a lease *reserving a net rent*: and that the proviso for re-entry in respect of trade must, with reference to *a lease of a public-house*, be also considered usual and common. (*d*)

It has been doubted whether a covenant not to assign be a common and usual covenant, (*e*) but it seems it is not. (*f*)

The rules applicable generally to the construction of covenants are, How covenants are to be construed.

1. The deed, covenant, or contract shall be expounded and taken from the whole instrument, according to the true intent and meaning of the parties appearing upon the face of it; not according to particular expressions; but the exposition must be *ex antecedentibus et consequentibus*, and according to the reasonable sense and construction of the words. (*g*) 2. Where any ambiguity arises, the covenant shall be taken most strongly against the covenantor. (*h*) 3. It shall be construed *ut res magis valeat quam pereat*. (*i*)

However generally these rules may have been understood, many of the old decisions appear to have been cramped by quaint technicalities; and to have referred to particulars, rather than at once contemplated the whole ex-

(*d*) Bennett v. Womack, 7 B. & C. 627. S. C. 1. Man. & R. 644.

(*e*) *Ibid.*

(*f*) See Church v. Brown, 15 Ves. 258. Henderson v. Hay, 3 B. & B. 632; and Church v. Morgan, 15 Ves. 258, overruling Morgan v. Slaughter, 1 Esp. N. P. 8; and Folkingham v. Croft, 3 Anst. 700, *et vide* Platt on Covenants, 430.

(*g*) Shep. Touch. 166. *Vide* Flowd. 329. Broughton v. Conway, Moore, 58. Trenchard v. Hoskins, Winch, 93. Griffith v. Goodhand, Sir T. Raym. 464. Kingston v. Preston, cited Doug. 689. Duke of

Northumberland v. Errington, 5 T. R. 526. Iggulden v. May, 7 East, 241. Gale v. Reed, 8 East, 89. Howell v. Richards, 11 East, 633. Duke of St. Albans v. Ellis, 16 East, 352. Browning v. Wright, 2 Bos. & Pul. 13. Flint v. Brandon, 1 New Rep. 73. Doe dem. Lady Wilson v. Abel, 2 M. & S. 541. Nind v. Marshall, 1 Brod. & Bing. 319.

(*h*) Shep. Touch. 166. Dann v. Spurrier, 3 Bos. & Pull. 399. Doe dem. Webb v. Dixon, 9 East, 15.

(*i*) Shep. Touch. 166.

tent of the covenant. This is particularly remarkable in cases where several covenants have appeared in one instrument, some of which have tended in any degree to narrow or extend the others. Much ingenuity seems to have been exhausted in ascertaining which were restrictive, and which dependant covenants. In one case it was said, "that an express general covenant in fact could not be restrained by any other subsequent covenant, if it could not be construed as part of the first general covenant. And this difference was taken, that if a restrictive clause be in the first, or last part of a sentence, or at the beginning of the first or at the end of the last sentence, which in good sense may be applied to one and the other, there it shall extend to both sentences; but otherwise it is if such sentence be placed in the *middle* of one or two sentences." (*k*) Upon which Mr. Serj. Williams (in his excellent edition of Saunders's Reports) observes, "it is questionable whether much regard would now be paid to this mode of construction. The chief object of courts of law at present is to discover the true meaning of the parties, and to construe the covenants accordingly. As far as the difference above laid down would tend to find out the intention of the parties, so far would it now be adopted, and no farther." (*l*) So that the rule is now brought back to the words used by one of our oldest reporters, "in every deed and condition (which are private laws between party and party,) a reasonable and equal intention shall be construed, although the words sound to a contrary meaning." (*m*)

Implied covenants.

Where a lease contained a *recital* of an agreement with the lessor, that the lessee should pull down an old smelting mill and build another of larger dimensions, and also contained a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain an express covenant to build it, it was held that the covenant to build was to be implied. (*n*) If a party contracts for a lease,

(*k*) Gainsford v. Griffith, 1 Wms. Saund. 60.

(*l*) *Ibid.* n. (1).

(*m*) Dyer, 15. a.

(*n*) Sampson v. Easterley, 9 B. & C. 505.

with knowledge of the fact that the party with whom he is contracting holds under a superior lease, it will be his duty to inquire into the nature of the covenants contained in such lease, and if there is no express stipulation in the agreement for the underlease in respect of the covenants to be contained in it, the underlessee will be bound to admit into the underlease the like covenants as are in the superior lease, of which he will constructively have notice. But if the agreement stipulates that the underlease shall contain the *usual* covenants, he will not be bound by any unusual covenant, of which he may have notice in the superior lease, because such an agreement will amount to a representation on the part of the lessor that he has power to grant an underlease with such covenants in it. (o)

Covenants in superior lease.

A covenant to pay all rates and taxes, land tax excepted, will comprehend an extraordinary assessment by commissioners of sewers, producing a permanent benefit to the land. (p)

Covenant to pay all rates.

VI. THE CONCLUSION.

The conclusion of the lease specifies the execution and date of the deed, or the time of its being given or executed, either expressly, or by reference to some day or year before-mentioned. (q) The signatures and seals of the parties, and the attestation of the witnesses, are also reserved for this part of the lease.

Conclusion of lease.

Where a lease is made by letter of attorney, it is proper to say in the conclusion of such lease "in witness whereof A. B. of such a place, &c., in pursuance of a letter of attorney hereunto annexed, bearing date such a day, (or if the letter of attorney be general, and concern more lands than those comprised in the present lease, then 'in pursu-

If lease is made under a power of attorney.

(o) *Cosser v. Collingé*, 3 Myl. & K. 283. *Van v. Corpe. ibid.* 269. *Propert v. Parker, ibid.* 281. (p) *Waller v. Andrews*, 3 Mees. & W. 312. (q) 2 Bl. Com. 304.

ance of a letter of attorney, bearing date such a day, &c. a true copy whereof is hereunto annexed,") hath put the hand and seal of the principal," and to write the principal's name, and deliver it as the act and deed of the principal; which last ceremony of delivering it in the name of the principal of such attorney, exactly agrees with the ceremony of surrendering by the rod, or making livery by a turf or twig, by the attorney in the name and as attorney of his principal. (r) Where a deed contains a power of attorney to A. B. to deliver seisin of the premises, the attorney need not make the livery on the day of the date of the deed, but his power is well executed afterwards. (s)

VII. THE INDORSEMENTS.

Indorsements.

An indorsement upon the deed shall be taken to be made before the execution of the deed, and so to be parcel of it. (t) And if it be made after the signing of the deed, but written at the same time with the sealing and delivery, so as to be part of the same transaction, it shall be taken as part of the deed. (u)

VIII. THE STAMP.

Stampa.

The legislature has from time to time imposed upon leases, whether by deed or unsealed writing, certain stamp duties, and unless a deed have the proper stamps required by law, it cannot be given in evidence. It should, however, be observed, that the acts which require deeds to be stamped, do not prevent their legal effect and operation, but only suspend their being pleaded or given in evidence, or admitted in any court to be good, useful, or available, till the duties and penalties be paid, and the deed be properly stamped. The

(r) Bac. Abr. *Leases*, (I). 10. And see Anon. Moore, 70. pl. 191.

(s) Roe dem. Heale v. Rashleigh, 5 B. & A. 156.

(t) Brewster v. Kidgell, Carth. 439. Flint v. Brandon, 1 N. R. 73.

(u) Lyburn v. Warrington, 1 Stark. 162.

omission of the stamps in the first instance is therefore immaterial, except so far as a penalty may be incurred, if the deed be afterwards duly stamped. (*v*)

A *lease* must be stamped *as a lease by deed*, though it be not by deed ; for it has been held that the statute 23 Geo. III. c. 58, which imposes a stamp duty on indentures, leases, and other deeds, applies to every instrument that operates as a lease, whether it be by deed or not. (*w*)

Though a parol lease for three years is good, yet if a man through caution will reduce it into writing, he must pay for the stamp, otherwise the Court are inhibited from receiving it in evidence. (*x*)

A bill of exchange, expressing the terms of agreement between a landlord and incoming tenant, cannot be read in evidence without an agreement stamp. (*y*)

When a parol agreement was made between A. and B., that the former should let, and the latter should take certain premises upon the terms and conditions contained in a lease of the same premises granted by A. to C., it was held that in an action by A. against B. for rent and non-repair, the lease could not be read in evidence, unless duly stamped as a lease. (*z*)

The lease stamp alone will be sufficient, although the deed contains a covenant by a third party for payment of rent, (*a*) or although a fine be *proved* to have been paid, but not so expressed in the deed. (*b*)

(*r*) *Fearne's Posthuma*, 411. *Rex v. Bishop of Chester*, 1 Str. 624. *Rex v. Reeks*, 2 Str. 716. *Infra*, 156.

(*s*) *Goodtitle v. Way*, 1 T. R. 735. *Harker v. Birkbeck*, 3 Burr. 1556. *Staniforth v. Fox*, 7 Bing. 590.

(*x*) *Bul. N. P.* 269.

(*y*) *Nicholson v. Smith*, 3 Stark.

N. P. 188.

(*z*) *Turner v. Power*, 7 B. & C. 625. 1 *Moody & Malk.* 131.

(*a*) *Pratt v. Thomas*, 4 Car. & P. 554. *Price v. Thomas*, 2 B. & Ad. 218.

(*b*) *Doe dem. Kettle v. Lewis*, 10 Barn. & C. 673. *Doe dem. Higginbottom v. Hobson*, 3 Dowl. & Ryl. 186.

If there be a reservation of rent for the house and land, and a distinct reservation for the furniture and fixtures, a stamp covering the former only will not be sufficient. (c)

One stamp will be sufficient, although the lease is of different farms, with distinct *habendums*, rents, and covenants, if the whole was one transaction. (d)

By the statute 55 Geo. III. c. 184, schedule, Part I. the following duties are imposed :

1. Upon leases granted upon fine, and at a rent under 20/.

1. On a lease of any lands, hereditaments, or heritable subjects granted in consideration of a sum of money by way of fine, premium, or grassum, paid for the same, without any yearly rent, or with any yearly rent under 20/., the same duty as for the conveyance on the sale of lands for a sum of money of the same amount, *viz.*

Where the consideration money shall } not amount to	£20 —£0 10
When amounting to £20 and under	50 — 1 0
50	150 — 1 10
150	300 — 2 0
300	500 — 3 0
500	750 — 6 0
750	1000 — 9 0
1000	2000 — 12 0
2000	3000 — 25 0
3000	4000 — 35 0
4000	5000 — 45 0
5000	6000 — 55 0
6000	7000 — 65 0
7000	8000 — 75 0
8000	9000 — 85 0
9000	10,000 — 95 0
10,000	12,500 —110,4c.

(c) Coster v. Cowling, 7 Bing. 456. (d) Blount v. Pearman, 1 Bing. 408. N. S.

Save and except leases for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, *by whomsoever granted*, and leases for a term absolute not exceeding twenty-one years, granted by *ecclesiastical* corporations aggregate or sole. (e)

Exceptions.

2. On a lease of any lands, hereditaments, or heritable subjects at a yearly rent, without any sum of money by way of fine, premium, or grassum :

2. Upon leases granted at a yearly rent without fine.

Where the yearly rent shall not amount to	£20	—	£1	0
When amounting to £20 and under	100	—	1	10
100	200	—	2	0
200	400	—	3	0
400	600	—	4	0
600	800	—	5	0
800	1000	—	6	0
1000 and upwards	—	—	10	0

3. On a lease of any lands, &c., granted in consideration of a sum of money by way of fine, &c., *and also* of a yearly rent amounting to 20*l.* or upwards, both the *ad valorem* duties payable for a lease in consideration of a fine only, and for a lease in consideration of a rent only, of the same amount.

3. Upon leases granted upon fine, and also at a yearly rent amounting to 20*l.*

Save and except the leases before excepted.

Exception.

4. On a lease of any kind, *not otherwise charged* in the schedule of the act, 1*l.* 15*s.*

4. Upon other leases.

5. For the counterpart or duplicate of any lease charged by the act with a duty not exceeding 1*l.* the like duty as on the lease.

5, 6. Upon counterpart.

(e) *Vide* Roe dem. Larkin v. Chenhalls, 4 M. & S. 23, as to a lease being properly stamped under the provisions of the stat. 48 Geo. III. c. 149.

6. For the counterpart of any other lease whatsoever, 1*l.* 10*s.*

And where any such lease, counterpart, or duplicate together with any schedule, receipt, or other matter put or indorsed thereon or annexed thereto, shall contain 2160 words, or upward, then for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further *progressive* duty of 1*l.*

General ex-
ceptions from
stamp duty.

Exemptions from the preceding and all other stamp duties; leases of waste or uncultivated lands to any poor or labouring persons for any term not exceeding three lives, or ninety-nine years, where the fine shall not exceed five shillings, nor the reserved rent one guinea *per annum*: and the counterparts or duplicates of all such leases.

7. Upon
agreements
for leases.

7. All agreements (and therefore *agreements for leases*,) not under seal, where the matter thereof shall be of the value of 20*l.* or upwards, are by the same statute charged with a duty, where the same shall not contain more than 1080 words, of 1*l.*

Where the same shall contain more than 1080 words 1*l.* 15*s.*, and for every entire quantity of 1080 words over and above the first 1080, a further *progressive* duty of 1*l.* 5*s.*

An instrument under seal, amounting only to an agreement for a lease, requires a stamp of 1*l.* 15*s.*, being a deed not otherwise charged in the schedule to the 55 Geo. III. c. 184. (f)

Where it is objected that an agreement which bears a 1*l.* stamp is inadmissible because it contains more than 1080 words, the counsel making the objection must be prepared

(f) Clayton v. Burtenshaw, 5 B. & C. 41. 7 Dowl. & Ryl. 800.

with a witness who can prove that he has counted the words, and can positively state their number. (g) If, however, when a written agreement is put in, the opposite party object that it contains a greater number of words than the stamp is proper for, and call a witness who has counted the words in the *counterpart*, that is reasonable evidence that it does contain more than the proper number of words, and the judge will direct the officer of the Court to count the words in the original. But the Court will not call on another cause to allow time for an instrument to be taken to the stamp office and be properly stamped. (h)

Figures are to be counted as words; but an indorsement on the back, and a page of the particulars containing a mere *repetition* of the description of the property, are not, it seems, to be counted. (i)

Where an agreement, duly stamped, contains a special clause for referring disputes to arbitration, and in a second agreement between the same parties, it is stipulated that disputes as to the construction of the second agreement shall be decided by arbitration, according to the provision of the first agreement, a stamp adapted to the number of words actually written in the second agreement, without counting the clause referred to, is sufficient, (j) it being neither indorsed or annexed. (k)

A memorandum of agreement, duly stamped as a lease, for taking the premises on the terms contained in an annexed abandoned lease not stamped, may be given in evidence as a lease. (l)

(g) *Bowring v. Stevens*, 2 C. & P. 337. 246. S. C. 7 B. & C. 390. 2 Y. & J. 72. 3 C. & P. 208.

(h) *Dudley (Lord) v. Robins*, 3 C. & P. 26. (k) See *Lake v. Ashwell*, 3 East, 326.

(i) *Ibid.* (l) *Pearce v. Cheslyn*, 5 Nev. &

(j) *Attwood v. Small*, 1 M. & R. M. 652.

8. Inventories of lands, furniture, fixtures, &c., referred to, and intended to be used in evidence, as part of, or material to any agreement or lease, but which shall be separate from and not indorsed on or annexed to it, must have a stamp of 1*l.* 5*s.*; and for every 1080 words over and above the first 1080 a progressive duty of 1*l.* 5*s.* (*m*)

But when by an agreement, land were to be farmed according to the covenants in an expired lease, the latter was held not to be a schedule, catalogue, or inventory containing the conditions or regulations for managing the farm, and therefore did not require a 1*l.* 5*s.* stamp. (*n*)

A memorandum or agreement for granting a lease at rack-rent of any messuage, land, or tenement under the yearly rent of 5*l.* ; is exempted from stamp duty, but this exemption does not apply if the interest be a beneficial one, as a building lease. (*o*)

Written demises, though not under seal, must be stamped as leases.

By force of the stamp act, all leases (except those especially exempted), must, as before mentioned, be stamped accordingly, whether they be by deed, or only by unsealed memorandum or agreement operating as a present demise. (*p*)

An instrument under seal, but amounting only to an agreement for a lease, requires a stamp of 1*l.* 15*s.*, as before noticed. (*q*) But where the unsealed writing merely amounts to an agreement for a future lease, it does not require a lease stamp, although the tenant occupies during the whole term under the agreement. (*r*)

(*m*) 55 Geo. III. c. 184. Sched. Part I.

(*n*) Strutt v. Robinson, 3 B. & Ad. 395.

(*o*) Doe dem. Hunter v. Boulcot, 2 Esp. 595.

(*p*) Goodtitle dem. Estwick v.

Way, 1 T. R. 735. Harker v. Birbeck, 3 Burr. 1556. Staniforth v. Fox, 7 Bing. 590.

(*q*) *Vide supra*, p. 153. Rex v. Ridgwell, 6 B. & C. 665.

(*r*) Phillips v. Hartly, 3 C. & P.

121.

The *ad valorem* stamp duty on a lease is to be regulated by the consideration appearing on the face of it. (s)

And even fraud, in not expressing the full consideration, Fraud. in order to evade paying to the revenue the full stamp duties, does not vitiate the lease : the parties are subjected to a heavy penalty, imposed by the 22d sec. 48 Geo. III. c. 149 : but the instrument is not avoided, as that might work injustice to innocent persons. (t)

The *ad valorem* duty applies only to considerations passing between lessor and lessee ; and, therefore, where the plaintiff declared that, in consideration that he would procure A. B. to grant a lease to defendant, the defendant promised to pay the plaintiff 170*l.*, and the proof was that A. B., having agreed to grant a lease to the plaintiff, the latter undertook originally to assign it to the defendant for the consideration mentioned ; but that afterwards a lease to which plaintiff was a party, and assented, was granted immediately by A. B. to the defendant, and the consideration to be paid by the defendant to the plaintiff was not mentioned in that lease ; it was held, that the lease was not void on account of this omission. (u)

It is immaterial with what stamp the instrument is stamped, provided it be of an equal or greater value than that required by the statute, and do not appear upon the face of it to be specially appropriated to any other instrument ; (w) and where the plaintiff demised a slate-pit at S. and stone quarries at M. to the defendant, under an indenture of lease, to hold the one from Lady-day, 1815, and the other from Michaelmas, 1817, for the several terms of fourteen years from the respective dates thereof, at the

Denomination
of stamp when
immaterial.

(s) *Duck v. Braddyll*, 13 Price, 228.
455. *M'Clel.* 217. S. C. (u) *Boone v. Mitchell*, 1 B. & C.
(t) *Duck v. Braddyl*, *supra.* S. P. 18.
Robinson v. Macdonnel, 5 M. & S. (w) 55 Geo. III. c. 184, s. 10.

yearly rent of 70*l.* for the slate-pit, and 130*l.* for the quarries; it was held that all the premises might be demised by one indenture of lease, and that one *ad valorem* stamp on the aggregate amount was sufficient; as the letting must be considered as one transaction; there being no evidence of an intent by the parties to defraud the revenue. (*x*)

Consequence
of omission to
stamp.

It has been already observed, (*y*) that the omission to stamp a lease or agreement previously to its execution does not vitiate the instrument : (*z*) but until a proper stamp be affixed (which may be done at any time after the execution, by paying the penalty for not stamping the instrument, over and above the stamp duty,) it cannot be received in evidence. (*a*)

On the payment of the penalty of 10*l.*, as directed by the 37 Geo. III. c. 136, the proper stamp to be affixed will be for the amount of duty then in force, and not the duty in force at the time of the execution of the instrument. (*b*)

Evidence of
the applica-
tion of a par-
ticular stamp.

Where an instrument contained a written contract of demise in general terms, with a several operation in respect to the different tenants who had signed it for different estates, at the different rents set opposite their signatures, and only one stamp appeared upon the paper, the Court held that it was matter of evidence to which contract such stamp applied; and that the circumstance of juxta-position of the stamp to the defendant's signature, which stood untouched while the other names appeared to have been cancelled, together with the date of the stamp-office receipt for the stamp and penalty, which shewed that it had been affixed recently before the trial (there being no evidence of a dispute with any other tenant, which could make the stamp necessary

(*x*) *Boase v. Jackson*, 3 B. & B. 185.

(*y*) *Supra*, 148.

(*z*) *Rex v. Bishop of Chester*, Str. 624. S. C. 8 Mod. 364. *Fearne's Posthuma*, 411. *Rex v. Reeks*, 2 Str. 716.

(*a*) *Rex v. Bishop of Chester*, Str. 624. S. C. 8 Mod. 364. *Harker v. Birkbeck*, Burr. 1563. *Goodtitle v. Way*, *ub. sup.*

(*b*) *Buckworth v. Simpson and another*, 1 C. M. R. 834.

for another purpose,) was evidence that it was intended to be applied to the contract with the defendant. (c)

An agreement operating as a surrender, requires a deed stamp. (d) A memorandum that the party in possession holds at sufferance, and will give immediate possession when required, does not amount to an agreement for a tenancy so as to require a stamp. (e) A receipt for rent due, after a notice to quit, with a proviso that it shall not be a waiver of the notice, does not require an agreement stamp. (f)

(c) Doe dem. Copley v. Day, 13 East, 241. Another statutable provision with respect to leases is for their registry. This provision affects only certain leases within certain districts. 1. By the statute 15 Car. II. c. 17, s. 8, which directs that all conveyances of lands being part of 95,000 acres, in the *Bedford Level*, shall be entered with the registrar thereby appointed, it is enacted that "no lease of the said 95,000 acres, or any part thereof, except leases for seven years or under, in possession, shall be of force but from the time it shall be entered with the registrar as aforesaid." 2. By the statute 2 and 3 Anne, c. 4, s. 1, all conveyances affecting lands, &c., within the *West Riding of York*, may, at the election of the parties, be registered, &c. 3. By the statute 6 Anne, c. 35, a similar provision is made with respect to the *East Riding*. 4. By statute 8 Geo. II. c. 6, with respect to the *North Riding*. And, 5. By the statutes 7 Anne, c. 20, and 25 Geo. II. c. 4, with respect to the county of *Middlesex*. It is declared, however, by the statutes respecting *Yorkshire* and *Middlesex* that the provisions shall not extend to any copyhold estates, or

to any leases at a rack-rent, or not exceeding twenty-one years;—or to any of the chambers in *Serjeants' Inn*, or the *Inns of Court* or *Chancery*. Upon the clause in the *Bedford Level* act it has been decided, that the omission to enter the lease with the registrar does not avoid it as between the lessor and lessee; but has only the effect of postponing its priority with respect to subsequent incumbrancers who have previously registered their titles. *Hodson v. Sharpe*, 10 East, 350; and upon the *Middlesex* act, where there are two assignments of the same lease, and that executed last is registered first, it has been recently held that the deed last registered, must in a Court of Law be deemed void; though the party claiming under the second assignment had full knowledge of the prior execution of the first. Doe dem. *Robinson v. Alsop*, 5 B. & A. 142. As to Irish leases, see the Irish statute, 6 Anne, c. 2.

(d) *Williams v. Sawyer*, 3 B. & B. 70.

(e) *Barry v. Goodman*, 2 Mees. & W. 768.

(f) Doe dem. *Wheble v. Fuller*, 1 Tyr. & Gr. 17.

SECTION II.

OF LEASES BY PERSONS ENABLED OR RESTRAINED BY
STATUTE.

Enabling and
disabling
statutes,

The persons enabled and restrained by the several statutes passed for that purpose have been already described. It remains here to consider the form of leases made by these several parties.

how expound-
ed.

It will be necessary in the first instance to become acquainted with the meaning which is to be affixed to particular expressions in these statutes.

“Lands usual-
ly letten.”

I. In the first place, by the words of the statute 32 Hen. VIII. c. 28, “the act shall not extend to any lease of any manors, lands, tenements, or hereditaments, which have not most commonly been letten to farm, or occupied by the farmers, for the space of twenty years next before such lease thereof made.”

Upon this clause of the statute Lord Coke observes, “that if the land have been let for eleven years at one or several times within those twenty years, it is sufficient.” (n)

But where waste land belonging to a vicarage, and which had remained uninclosed and useless, from the inability of the vicars to incur the expense of inclosure, was let (having never been letten before) by the incumbent, with the confirmation of the patron and ordinary to J. S. for three lives; J. S. undertaking to reclaim the land, and to pay a rack-rent, which was the most that could be obtained: it was

(n) Co. Lit. 44. b.—And see Mallet *v.* Mallet, Cro. Eliz. 707. In the case of Pemble *v.* Sterne, cited

in the next page, Lord Coke’s doctrine is denied.

held that this lease was not binding upon the incumbent's successor. (*o*)

Every species of demise for lives, years, or at will, whether granted by deed or parol, by copy of court-roll, or covenant to stand seised, will be a sufficient letting to farm within the statute; provided such letting have been made by persons seised of an estate of inheritance; and not by guardian in chivalry, tenant by the curtesy, tenant in dower, or the like. (*p*)

Whether or not it was necessary that the lands should have been let *within* twenty years, was a question which on one occasion divided the bench.—The archbishop of York in 1604 made a lease which was surrendered in 1630; and the lands remained unlet until 1662, when the archbishop made a lease to the lessor of the plaintiff and died. His successor entered and let to the defendant; and the question was, whether these lands, not having been let since 1630, could be leased again. *Keeling*, C. J., and *Twisden*, J., held that they might. But *Moreton*, J., and *Wyndham*, J., held the contrary. No judgment was, therefore, given at that time: but *Moreton*, J., dying, judgment was given for the plaintiff; (*q*) which appears to have been acquiesced in. (*r*)

Secondly, copyhold lands are not within the enabling or disabling statutes; because these statutes affect only such lands as are grantable by deed; whereas copyholds are demisable by surrender according to the custom of the manor (*s*)

Copyholds not within these statutes.

(*o*) Doe dem. *Tennyson v. Lord Yarborough*, 1 Bing. 24.

(*p*) Co. Lit. 44. *b.* Anon. *Dyer*, 271. *b.* pl. 28. *Dean and Chapter of Worcester's case*, 6 Rep. 37. *Baugh v. Haynes*, Cro. Jac. 76. *Right dem. Basset v. Thomas*, Burr. 1441.

(*q*) *Pemble v. Sterne*, Sir T. Raym. 165. S. C. 1 Lev. 212. 2

Keb. 213. 1 Sid. 416. The latter reporter is careful to mention that the plaintiff was the lessee of Justice Twisden's brother.

(*r*) *Vide* Bac. Abr. (E) 2. Rule 6.

(*s*) *Rowden v. Malster*, Cro. Car. 44. Bac. Abr. *Leases*, (E) 2. Rule 5. *Gilb. Ten.* 179, 185.

"Twenty-one years or three lives."

II. The leases to be made under these statutes are limited to the term of twenty-one years or three lives; by the statute 32 Hen. VIII. c. 28, *from the day* of the making: and by the statutes 1 Eliz. c. 19, and 13 Eliz. c. 10, from the *making*. (t) But a lease of houses under the statute 14 Eliz. c. 11, may commence from a future day; because that statute is silent as to the commencement; and merely requires that the lease should not exceed the time thereby limited. (u)

Commencement of lease under 32 Hen. VIII.

In *Bacon's Abridgment*, (w) it is stated if tenant in tail make a lease for twenty years, rendering the usual rent, *habendum* from Michaelmas next ensuing, this seems a good lease, although it did not begin from the making of the lease, according to the proviso, 32 Hen. VIII. c. 28, for the intent of the statute was only that the lease should not exceed the number of twenty-one years from the making; and reference is made to a case in Dyer, (x) in which it appears, the judges were divided on the point, and the reports adds *Ideo quære*. In a note to that case, *Thompson v. Trafford's case*, (y) is quoted as a judgment by the whole Court, that the lease was a good lease warranted by the statute, notwithstanding that Lord Coke lays it down as one of his rules, that leases upon that statute are not good if they do not commence from the day of the making. The view taken in *Bacon's Abridgment* has been adopted in Woodfall. In the seventh edition, the quotation from *Bacon's Abridgment* is stated in full; (z) in the eighth edition it is merely stated that such a lease seems to be good. (a)

(t) Where a lease for years by a prebendary was made to commence "from the day of the date," it was held by Treby, C. J., against the rest of the court, that it was void under the statute 13 Eliz. c. 10; because the expression "from the day of the date," *excluded* the day upon which the lease was made; so that the lease was in reversion, and did not begin "from the mak-

ing." *Hatter v. Ash*, 3 Lev. 438. S. C. Ld. Raym. 84. As to the distinction between "from the date" and "from the day of the date," *vide supra*.

(u) *Thompson v. Trafford*, Poph. 8.

(w) 4 Vol. 33.

(x) P. 246.

(y) *Vide supra*.

(z) P. 56.

(a) P. 133.

It will, however, be observed, that the case of *Thompson v. Trafford*, was as above remarked, a question on a lease under the 14 Eliz. c. 11, which is silent as to the commencement of the lease, and therefore is in fact no authority on the point. The better construction of the statute appears to be with Lord Coke, although if the *demise* should be *immediate*, so as to take effect in *interest* from the day of the date, but the computation of the term should be from a future day; this might, perhaps, be upheld if the entire term, counted from the day of the making, did not exceed twenty-one years. It is, however, most prudent to make the lease in the form recommended by Lord Coke, although if necessary the reasoning above suggested might, if applicable, be resorted to in order to maintain the lease.

The lease must be for three lives *or* for twenty-one years; it cannot be for three lives *and* twenty-one years: (b) nor can it be for a greater number than twenty-one years determinable upon three lives. (c)

(b) Co. Lit. 44. b.

(c) *Vide* Whitlock's case, 8 Rep. 70. b. That case turned upon the construction of a *power* to make leases; and a distinction was there taken between a power to make leases for any term *not exceeding* three lives or twenty-one years, and a power to make leases for twenty-one years or three lives. In the latter instance it was agreed that a lease for a greater number of years than twenty-one, though determinable on three lives, would clearly exceed the express words of the power; but in the former, that a lease for ninety-nine years determinable on three lives, would be good; because it would not exceed three lives. Upon the difference of expressions used by the enabling and disabling statutes, and from the case of *Smith v. Trinder*, Cro. Car. 22, where a lease by a

husband seised *jointly* with his wife for sixty years determinable with their lives, was holden good upon an objection wholly unconnected with the point in question, (that particular point not having been then agitated) the learned author of the article "*Leases*," in Bacon's Abridgment, infers that, though under the statutes 1 Eliz. c. 19, and 13 Eliz. c. 10, a lease for ninety-nine years, determinable upon three lives, would be bad; such a lease would be good under the statute 32 Hen. VIII. c. 28. In *Glanville v. Payne*, 2 Atk. 40, it is, however, reported that the Lord Chancellor Hardwicke laid it down as a rule, that the statute 32 Hen. VIII. c. 28, s. 2, gives a tenant in tail power only to make leases for three lives absolutely; and "not for ninety-nine years determinable upon three lives;" a

A lease to A. B. and C. for their lives is good. (d) But a lease to A. for life, remainder to B. for life, remainder to C. for life, would it seems be bad. (e)

It is not necessary that the lessee should be one of the lives ; therefore a lease to A. for the lives of B. C. and D. is good within the statutes. (f)

If a bishop make a lease for *four* lives, and one of the lives die during the life of the bishop, so that at his death there be only three lives in being, still the lease will be void against the successor ; for, being void at its origin, no subsequent event can make it valid. (g)

A lease for less than twenty-one years will be good under the statutes. (h)

The further restrictions imposed by the 6 & 7 Wm. IV. c. 20, before noticed, must also be observed in the renewal of church leases, *viz.*, that where a lease has been granted for two or more lives, no renewed lease shall be granted until one or more of such lives have dropped, and then only so as to supply the lives for which the lease was originally granted. If the lease has been granted for years, no renewed lease is to be granted until the determination of the number of years following (that is) if for forty years until the expiration of fourteen ; if for thirty years, until ten ; or if for twenty, until seven ; and if granted for years, no renewal shall be made for lives.

But if there has been a practice to renew at shorter

rule of course not restricted to tenant in tail, but extending to all persons comprised within that statute. *Vide* Thredneedle v. Lynham, 3 Keb. 595.

(d) Baugh v. Haynes, Cro. Jac. 76.

(e) Owen v. Apprees, Cro. Car.

95. S. C. Hetl. 22.

(f) Dean and Chapter of Worcester's case, 6 Rep. 37. Baugh v. Haynes, *ub. sup.*

(g) Bishop of Salisbury's case, 10 Rep. 62.

(h) Carter v. Claycole, 1 Leon. 308.

periods than fourteen, ten, and seven ; then the renewal may be made conformably to such [practice, with such consent as in the act mentioned.

III. An annual rent must be reserved *not less* than has “ Usual rent.” been annually reserved within twenty years next before the making of the lease. (i)

Where, therefore, a lease was made by a college merely to try a title, and no rent was reserved, the lease was held void. (k)

If the ancient rent were 10*l. per annum*, and a bishop make a lease reserving 5*l.* during his life, and 10*l.* to his successor, the lease is still void. (l)

Where several rents had been reserved within twenty years upon several leases of the same premises, as upon the first 5*l.*, upon the second 20*l.*, upon the last 40*l.*, it was held that the last was the rent within the statute, which was to govern the new leases ; for the rent which had been altered could not be called the *accustomed rent*. (m)

Where, besides the annual rent, something else not annual, but casual, has been accustomably reserved, as a heriot upon the death of the tenant, the lease will not be avoided by the omission of such casual thing, provided the rent itself be properly reserved. (n) And so where a former lease had been made, reserving the running of a colt, and rendering rent, and a new lease was made rendering the same rent, without reserving the running of a colt, it was adjudged good. (o)

A precentor of St. Paul's made a lease of lands, the an-

(i) Bishop of Hereford *v.* Scory, 325.
Cro. Eliz. 874.

(k) Carter *v.* Claycole, Moore, 593.

(l) *Ld. Mountjoy's case*, 5 Rep. 6. b.

(m) *Morrice v. Antrobus*, Hardr.

(n) Dean and Chapter of Worcester's case, 6 Rep. 37. *Baugh v. Haynes*, Cro. Jac. 76. See *Ensden v. Denny*, Palm. 106.
(o) *Ibid.* Co. Lit. 44. b. n. (6).

cient rent whereof was 40*l.* and two capons, and reserved only the 40*l.*, but took a covenant from the lessee to pay yearly over and above the 40*l.* two capons or 6*s.* 8*d.*; it was held that this was such a covenant as amounted to a reservation, and that therefore the lease was good against the successor. (*p*)

Where twenty acres of land have been usually let, and a lease is made of those twenty and of another acre, which has not been usually let, reserving the accustomed yearly rent and so much more as even exceeds the value of the other acre, this lease is not warranted by the statute; because part of it has not been accustomably let, and the rent is reserved out of the whole. (*q*)

So, if tenant in tail, or a spiritual person in right of his church, seised of a manor, whereof the copyholds and services have not usually been let, but only the freehold demesnes, make a lease of the whole manor, reserving such *entire* sum as amounts to the accustomed rent, this lease will not bind the issue or successor. (*r*)

A prebend, usually let, with the exception of all crab-trees, at 17*l. per annum*, was let for three lives at that rent, without the exception: it was resolved that the lease was void as against the successor; because, as the exception of the trees included the soil itself, (*s*) more than had been accustomably let would pass to the lessee, and the rent could not therefore be said to be the accustomed rent. (*t*)

More may be reserved.

More than the accustomed rent may be reserved; (*u*) therefore, where a bishop seised of two manors in right of his bishopric, which had been usually let for 60*l. per annum*, made a lease for twenty-one years of one of the manors re-

(*p*) *Morrice v. Antrobus, supra.*

(*q*) Lord Mountjoy's case, 5 Rep. 4.

(*r*) See 4 Bac. Abr. 84, and *Tanfield v. Rogers, Cro. Eliz. 240. Infra.*

(*s*) *Supra.*

(*t*) *Smith v. Bole, Cro. Jac. 458. S. C. 3 Bulst. 290.*

(*u*) *Co. Lit. 44. b.*

serving the whole rent, it was holden upon error from the King's Bench that this was a good lease; for the statute 1 Eliz. c. 19, s. 6, says that the old accustomed rent, or more, shall be reserved. (v)

It is laid down by Lord Coke that, under the enabling statute, a lease of part of the land accustomably let, reserving a rent *pro rata*, or more, will be good, it being in substance the accustomable rent. (w) The contrary, however, has been held; (x) and, according to the preamble of the statute of the 39 and 40 Geo. III. c. 41, (y) doubts existed upon this doctrine, as far as related to the leases of ecclesiastical persons, to remove which that statute was passed: so that Lord Coke's doctrine is now undeniable as applied to those particular leases. But as the statute is perfectly silent as to the leases of tenant in tail, and of husband seised *jure uxoris*, any doubts which may have existed upon the words of the enabling statute still apply to the leases of these parties. Nor does the statute affect leases, under one demise at a joint rent, of two or more farms usually let separately at separate rents, the joint rent being equal to, or exceeding, the amount of the former several rents. Such a lease, according to the opinion of the whole Court in Lord Mountjoy's case, would be bad. (z)

If the accustomable rent has been reserved yearly, payable at the four quarterly feasts, it may nevertheless be reserved upon the new lease payable yearly at one particular time. (a)

If the old rent were reserved in any particular form, the new rent should be reserved in like manner. Therefore, it

(v) *Threadneedle v. Lynham*, 1 Mod. 203. S. C. 2 Mod. 57. 3 Keb. 192, 595. Pollexf. 176. 1 Freem. 92, 179.

(w) Co. Lit. 44. b.

(x) Lord Mountjoy's case, 5 Rep. 5. b., and *Owen v. Apprees*, Cro. Car. 94.

(y) *Supra*, p. 49.

(z) 5 Rep. 5. b., and see *Smith v. Trinder*, Cro. Car. 23, and *Orby v. Lord Mohun*, 3 Ch. Rep. 75. Sugden on Powers.

(a) Co. Lit. 44. b. *Dean and Chapter of Worcester's case*, 6 Rep. 38. *Cook v. Younger*, Cro. Car. 17.

is said that if the old rent were payable in gold, and the new be reserved in silver, the lease will be bad ; but that if by the old lease a quarter of corn were reserved, a reservation in the new lease of eight bushels will be good. (*b*)

Surrender of
old lease.

Lastly, if there be an old lease in being, it must be surrendered, or must have expired, or have been determined, within a certain time after the making of the new lease ; if the new lease be made under the statute of 32 Hen. VIII. c. 28, within one year, if under the statute 13 Eliz. c. 10, within three years, next after the *making* thereof. (*c*) The surrender must be absolute ; and not such a conditional surrender, as may enable the parties again to set up the old leases by breach of the condition. (*d*) But where the tenant of a prebendary surrendered his lease, *upon condition* that the prebendary would grant him a new lease, which he accordingly did, the Court held that this was a good surrender within the statute, to make the lease binding upon the successor. (*e*) It seems, indeed, marvellous that this should ever have been questioned ; because, supposing the conditional surrender *in fact* to have been bad, the acceptance of the new lease, by the lessee of the old one, would have operated as a surrender in law, and the terms of the statute would have been thus complied with ;—it being settled that a surrender in law, by taking a new lease to commence either *in præsentia* or *in futuro*, is a good surrender within these statutes. (*f*)

The vesting of the term granted by the old lease in the lessee under the new one within three years from the making of the latter, will be a sufficient surrender within the statutes : for where a lease had been made by the warden, &c., of an hospital to A. for years, and A. made an assignment to B.

(*b*) Lord Mountjoy's case, *ub.* 2154.

sup. Leases by governors of colleges in Ireland must, under the Irish act 10 & 11 Car. I. c. 3, s. 2, reserve more than a moiety of the true value, at the peril of the lessee. *Clements v. Waller*, Burr.

(*c*) 18 Eliz. c. 11.

(*d*) Co. Lit. 44. *b.* *Elmer's case*, 5 Rep. 3.

(*e*) Wilson dem. *Eyre v. Carter*, Str. 1201.

(*f*) Poph. *ub. sup.*

upon trust as to four undivided sixth parts for C., and as to another sixth part for D., and as to the remaining undivided sixth part for E., the interest of D. was afterwards assigned to C., who became possessed in equity of five-sixths, the hospital then made a new lease to C., in consideration (as was alleged) of a surrender of the first lease. At this time there was considerably more than three years of the first lease to run. After this, C. obtained an assignment from E. of his equitable sixth part, and being then possessed of the entire beneficial interest, he took an assignment from B. of the legal interest in the first lease, within the space of three years *from the making of the second lease*. The Court of King's Bench certified to the vice-chancellor, that the successors were bound by the second lease. (g)

The necessity of the old lease being surrendered or expired applies not only to the cases where a new lease is made by corporations sole (other than bishops) with the confirmation of those whom the law requires, and where it is made by a corporation aggregate which requires no confirmation, but also to the cases where bishops and the other corporations sole empowered by the statute 32 Hen. VIII. make new leases without the confirmation of any other person. (h)

This enactment for surrendering the former lease has been evaded by the invention of concurrent leases, which, though contrary to the spirit of the several statutes when taken together, have nevertheless been held good.

Of concurrent leases.

Thus if a bishop make a lease for twenty-one years pursuant to the statute 32 Hen. VIII. c. 28, and within four or five years afterwards make a new lease to another for twenty-one years, to begin from the making, &c., this second lease, if it be confirmed by the dean and chapter, and be not contrary to the provisions of the statute 1 Eliz. c. 19, s. 5, is good as a concurrent lease. For 1, though it would be

(g) *Gumbrell v. Roper*, 3 B. & A. 711.

(h) *Bac. Abr. Leases*, (E) 2. Rule 3.

void within the statute 32 Hen. VIII. because the first lease had not been surrendered or expired within a year after the making: yet *being confirmed by the dean and chapter*, it remains a good lease at common law, and not being contrary to the statute 1 Eliz. c. 19, will bind the successor. (i)

But after a lease for years, a bishop could not make a lease for lives to be good by way of concurrent lease, though confirmed by the dean and chapter; nor after a lease for lives, could he make a lease for even twenty-one years with confirmation. For this is said to be contrary to the exception in the stat. 1 Eliz. c. 19, which is the disjunctive for three lives *or* twenty-one years. A concurrent lease would, therefore, only be good where both were for years, so that the determination of the first and commencement of the second might be ascertained immediately upon the making.

The statute of the 6 & 7 Wm. IV. c. 20, before mentioned, has also placed a restriction on these concurrent leases, by enacting, that no concurrent lease shall be granted until seven years of the prior lease for twenty-one years shall have expired.

Of such houses and so much land as by the statute 14 Eliz. c. 11, ecclesiastical persons may let for forty years no concurrent lease or lease in reversion could be made, because that statute expressly forbids leases in reversion; and the statute 18 Eliz. c. 11, relates only to the statute 13 Eliz. c. 10, as before observed.

Therefore, where it was found upon a special verdict, that the dean and chapter of St. Paul's made a lease for forty years of a house in *London*, to begin *in præsentî*, there being then ten years of a former lease to a stranger to come,

(i) Fox v. Collier, Moore, 107. S. C. 1 And. 65. Lepur v. Wroth, 1 Leon. 38. But the confirmation must be in the lifetime of the bishop; though according to one authority, if the concurrent lease be confirmed in the vacation of the bishopric, it is good enough. Grindall's case, 4 Leon. 73, and see Sugden on Powers.

the Court held this lease void by the statute 13 Eliz. c. 10, and not warranted by the statute 14 Eliz. c. 11; for the second lease was a lease in reversion. (*k*)

But a lease by a vicar confirmed by patron and ordinary of messuages and lands within the intent of the 14 Eliz., but not in compliance with the regulations of that statute, has been held to be good within the 13 Eliz. and 18 Eliz., as if such a lease be made by a vicar for twenty-one years, within the last three years of an existing lease of forty years. (*l*)

Subject to the foregoing constructions upon the particular expressions of the statutes, we shall proceed to consider the form of leases to be made by the persons affected thereby.

Form of lease,
1. by tenant in
tail.

And, 1. Of the leases of tenant in tail, made under the statute 32 Hen. VIII. c. 28, so as to bind the issue, but not those in remainder or reversion.

1. The lease must be by deed indented, (*m*) and be of lands, tenements, or hereditaments, whereout a rent by law may be issuing, and not of things which lie in grant. (*n*)

2. *Habendum* for a period not exceeding three lives, or twenty-one years, (but not for both) from the day of the making. It may of course be for a less term or fewer lives, but not for a term exceeding twenty-one years, determinable on lives: (*o*) it is doubtful whether the commencement of the term, may be *in futuro*, although the expiration of

(*k*) Hunt v. Singleton, Cro. Eliz. 564. See also Dean and Chapter of Westminster's case, Cart. 9. Bayly v. Munne, 3 Keb. 46, 107, 193. S. C. (Bayly v. Munday) 2 Lev. 61. S. C. (Bayly v. Murin) 1 Vent. 246.

(*l*) Vivian v. Blomberg, 3 Bing. N. S. 311. 7 Sim. 548, *et vide supra*.

(*m*) The indenting of the deed being mere matter of form may be

done even in Court; so that no objection can be taken to the omission of this point. Bac. Abr. Leases (E) 2. n. Vide Co. Lit. 143. b. Ibid. 229. a. Frampton v. Stiles, Cro. Eliz. 472. S. C. 5 Rep. 21. 3 Lev. 438. Cro. Jac. 94, 458.

(*n*) Co. Lit. 44. b.

(*o*) Elmer's case, 5 Co. 2. Co. Lit. 44. b. Glanville v. Payne, 2 Atk. 40.

the term is not beyond the limits of the statutes from the making. (*p*)

3. *Reddendum*, not less than the yearly rent reserved for any eleven years at one time within twenty years before the making of the lease. It may be *pro rata*, and the ancient copyhold rent will, it seems, answer the description of the accustomed rent. (*q*)

4. The lessee must not be dispunishable of waste. (*r*)

5. Old leases must expire or be surrendered within *one* year from the making of the new lease, and the surrender must be absolute and not conditional. (*s*) There must not be a double or concurrent lease in being at one time. (*t*)

2. By husband
jure uxoris.

II. Leases made by husband and wife, of lands held by the husband *jure uxoris*, or by the husband, of land held jointly with his wife, must conform to the provisions of the statute already detailed, in order to be binding upon the wife and children after the death of the husband. Where the lease is made of lands of which the husband is seised *jure uxoris*, she must join in the execution of the lease, and the rent must be reserved to the husband and wife; but the proviso in the statute to this effect does not extend to cases where the lease is of lands of which the husband is seised jointly with his wife; there the sole execution of the husband is sufficient. (*tt*)

Since the facilities afforded by the 3 & 4 Wm. IV. c. 74, both in respect of the estates of tenants in tail and married women, the statute of the 32 Hen. VIII. need be rarely resorted to in support of leases by tenant in tail, and husband and wife, except in cases where the provisions of the former statute have not been complied with.

(*p*) *Thompson v. Trafford*, Poph. 8.

(*q*) Co. Lit. 44. *b*. Mountjoy's case, 5 Co. 6. *Banks v. Brown*, Moore, 759.

(*r*) Co. Lit. 44. *b*.

(*s*) *Elmer's case*, 5 Co.

(*t*) Co. Lit. 44. *b*.

(*tt*) *Smith v. Trinder*, Cro. Car. 22.

III. All spiritual persons (except parsons and vicars) *may* make leases *without confirmation*, provided they conform to the enabling statute of the 32 Hen. VIII. Parsons and vicars, and all other spiritual persons, may make leases *with confirmation*, and independent of the enabling statute, but must conform to the disabling statutes.

3. By ecclesiastical persons.

In the first place, therefore, all spiritual persons intending to take advantage of the enabling statute, and to make leases without confirmation, must bring themselves within the provisions of that statute, and adopt the same forms as are prescribed for the leases of tenant in tail, reserving the rent to them and their successors, instead of to them and their heirs. Their leases will then be binding upon their successors without confirmation.

Under stat. 22 Hen. VIII. c. 28.

But if the leases of spiritual persons be not made conformably to the statute 32 Hen. VIII., (and we have seen that the leases of parsons and vicars never can, nor the leases of tenements of any spiritual person which have not been let within twenty years preceding the new lease,) then the following forms must be observed.

Under 1 Eliz. c. 19, and 13 Eliz. c. 10.

1. The lease must be by deed. This is not expressly enjoined by the disabling statutes: but it is laid down that in this respect the leases made under these statutes must take those made under the enabling statute as their pattern. (*u*)

2. *Habendum* for three lives or twenty-one years from the making; (*v*) excepting leases by all spiritual persons (other than archbishops and bishops) of houses in cities and towns, and the lands appurtenant, which may be leased for forty years. (*w*)

3. *Reddendum*, not less than the old accustomed yearly rent. (*x*)

(*u*) Co. Lit. 45. *a*. Morrice *v.* Antrobus, Hardr. 325. visions required in such case, *ante*, p. 32.

(*v*) 1 Eliz. c. 19, 13 Eliz. c. 10.

(*x*) 1 Eliz. c. 19, 13 Eliz. c. 10.

(*w*) 14 Eliz. c. 11. See the pro-

4. They must not be made without impeachment of waste; a provision which, though not expressly contained in the disabling statutes, is still required by the equity of them. (y)

5. Former leases of the same lands must have expired, or be surrendered within *three* years from the making of the new lease. (z)

Must be confirmed.

6. The lease must be confirmed by the proper parties, as at common law; because the restraining statutes authorize no dispensation of this ceremony.

Leases of archbishops and bishops how confirmed.

The proper parties to confirm the leases of archbishops and bishops are their respective deans and chapters; (a) and, if a bishop have two chapters, his lease must be confirmed by both. (b) The dean must join with the chapter, and the confirmation of the sub-dean will not be sufficient. (c)

Neither will the confirmation of a dean *in commendam* be sufficient: but if a dean be elected bishop of another diocese, and before consecration obtain a dispensation to hold his deanery *in commendam*, his old title remains, and his confirmation is good. (d)

If a bishop have no dean and chapter, his leases, where confirmation is necessary, must be confirmed by the clergy of his diocese. (e) And this seems to be the proper course, where there is merely a dean by *recipere in commendam*. (f)

Leases by prebendaries, archdeacons, &c. how confirmed.

Where leases are made by prebendaries or archdeacons, &c., the bishop, as well as the dean and chapter of the diocese, must confirm; for the bishop being the patron and ordinary of every prebend, if they be merely confirmed by

(y) Dean and Chapter of Worcester's case, 6 Rep. 37.

(z) 18 Eliz. c. 11.

(a) Bishop of Salisbury's case, 10 Rep. 60.

(b) Co. Lit. 301. a. Anon. Dyer, 58. b. pl. 7.

(c) Bac. Abr. *Leases*, (G.) 2.

(d) Evans v. Ascough, Latch. 233. S. C. Sir W. Jones, 158. Palm. 460. Noy, 94.

(e) Case of Proxies, Dav. 1. 1 Rol. Abr. 477. l. 33.

(f) Bac. Abr. *ub. sup.*

the dean and chapter, they will not bind the succeeding prebendary or archdeacon. (*g*)

The proper parties to confirm the lease of a parson or vicar are the patron and ordinary : and no confirmation is necessary by the dean and chapter ; for they have nothing to do with what the bishop does as ordinary, in the lifetime of the bishop. (*h*)

Leases by parsons, or vicars, how confirmed.

But if the bishop be patron of the church in right of his bishopric, and also ordinary, then the dean and chapter must likewise confirm the leases made by the parson ; because the advowson is part of the bishopric, which the bishop cannot charge so as to bind his successor without the concurrence and confirmation of the dean and chapter. (*i*)

When the bishop, being both patron and ordinary, collates a clerk, who makes a lease which is confirmed by the bishop, but not by the dean and chapter, and then dies ; and after his death the bishop collates another clerk, the new incumbent cannot avoid the lease of his predecessor ; for he comes in by the mere collation of his patron and ordinary, and must, therefore, be bound by what his patron and ordinary have done. (*k*) But, after the death of the bishop, the new bishop or his incumbent may avoid the lease ; but not upon his translation or resignation. (*l*)

If the parsonage or vicarage be a donative, the confirmation of the patron alone to all leases made by the parson or vicar, is sufficient to bind the successor. (*m*)

If there be a patron paramount, as well as an immediate patron, both must confirm ; as if a parson be patron of the

(*g*) Dyer, 61. *b.* pl. 30. Champion's case, *ibid.* 106. *b.* pl. 21. Hodgeskins *v.* Tucker, *ibid.* 240. *b.* is *may*. But where a rectory in the diocese of *Exeter* had been annexed by royal grant to a prebend of *Sarum*, the Court held that the bishop of *Sarum* and the dean and chapter there, were the proper par-

ties to confirm a lease of such rectory, *Gie v. Rider*, 1 Sid. 75.

(*h*) Co. Lit. 300. *b.*

(*i*) Co. Lit. 300. *b.*

(*k*) Anon. Dyer, 356. *b.* pl. 42. *Lancaster v. Lucas*, 1 Leon. 235.

(*l*) *Ibid.*

(*m*) 1 Rol. Abr. 481. l. 48. Bac. Abr. *Leases*, (G.) 2.

vicarage of the same church, and the vicar make a lease, confirmed by the parson and ordinary, this is not good without the confirmation of the patron of the *rectory* also. (n)

When a parson makes a lease for twenty-one years, and the patron confirms the lease for seven years, this will operate as a confirmation for the twenty-one. (o)

The confirmation must always be proportionable to the quantity of estate of the person confirming. Therefore if the patron be but tenant in tail or tenant for life, the confirmation will bind only such incumbents as come into the church during the patron's life. And so if the patron have only a conditional estate, and he confirm the parson's lease, and then the condition be broken, this defeats the confirmation, and the next incumbent will not be bound by it. (p)

Time of confirmation immaterial;

The time at which the confirmation is made is immaterial, so long as it be made in the lifetime of the parties to the lease; and it may be before as well as after the making of the lease. (q)

Therefore, if a bishop make a lease for twenty-one years according to the statutes, and afterwards make a concurrent lease for years of the same land to another and then, before any confirmation of the second lease, make another concurrent lease to a third person, which is immediately confirmed, and then the second lease is also confirmed, the second lease shall be as effectual as if it had been first confirmed. (r)

provided it be during the life of the lessor.

The lease, however, ought to be confirmed during the life and incumbency of the lessor; because at his death, resignation, or other removal, the lease becomes void for want of confirmation. (s) But if a parson make a lease which is not confirmed by the patron and ordinary then in being, but

(n) Bac. Abr. *ub. sup.*

(q) *Ibid.*

(o) Belford v. Foord, Cro. Eliz. 447, 472. S. C. 5 Rep. 81. Fitzwilliam's case, Dyer, 52. b. Anon. *ibid.* 338. b. pl. 43.

(r) Anon. Moore, 66. See Newcomen's case, cited 5 Rep. 15. b. Higgins v. Grant, Cro. Eliz. 18.

(s) Co. Lit. 301. a.

(p) Co. Lit. 300. b.

by the succeeding bishop and patron, the lease will be good and binding on the successor; because the lease, being good against the parson himself, required only confirmation to make it good against the successor. (*t*)

IV. V. The leases of ecclesiastical corporations *aggregate* and eleemosynary corporations must conform to the same rules as those of ecclesiastical persons; excepting only the confirmation, which is not requisite for them either at common law, or by statute. The exception as to houses in cities, &c., made by the statute 14 Eliz. c. 11, extends also to aggregate corporations.

4, 5. Leases by corporations aggregate.

By the statute 4 Geo. II. c. 28, s. 6, which recites "that whereas many persons hold considerable estates by leases for lives or years, and lease out the same in parcels to several under-tenants, and whereas many of those leases cannot by law be renewed without a surrender of all the under-leases derived out of the same, so that it is in the power of any such under-tenants to prevent or delay the renewal of the principal lease, by refusing to surrender their under-leases, notwithstanding they have covenanted so to do, to the great prejudice of their immediate landlords the first lessees; for preventing such inconveniences, and for making the renewal of leases more easy for the future;" it is enacted, "that in case any lease shall be duly surrendered, *in order to be renewed*, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any of the under-leases, be as good and valid to all intents and purposes as if all the under-leases derived thereout had been likewise surrendered at or before the taking of such new lease, and every person in whom any estate for life or lives, or for years, shall be vested by virtue of such new lease, and his executors and administrators shall be entitled to the rents, covenants, and duties, and have the like remedy for recovery thereof, and the under-lessees shall hold and enjoy the messuages, lands and tenements in the respective under-leases comprised, as if the original leases

Statute of Geo. II. c. 28.

(*t*) *Newcomen's case, ub. sup.* Sir Robert Banister's case, Cro. Car. 38.

out of which the respective under-leases are derived, had been still kept on foot and continued, and the chief landlord and landlords shall have the same remedy by distress and entry upon the premises for rent reserved by such new lease, so as the same exceed not that reserved in the lease out of which such under-lease was derived, as they would have had in case such former lease had been still continued, or the under-lease had been renewed under such new principal lease."

SECTION III.

OF THE FORM OF LEASES UNDER POWERS.

From the necessity of the case, equity has been disposed to uphold agreements for leases to be granted pursuant to a power, although the party having the power, and entering into the agreement should die without executing the lease; and it has been decided, that such an agreement will be binding on the remainder-man. (*v*)

A power to grant leases is a personal confidence, and cannot be deputed to another, and therefore cannot be exercised by letter of attorney. (*w*)

A power given to remainder-man to lease *after the death* of tenant for life, cannot be exercised in the lifetime of the tenant for life, although he grants his life estate to the remainder-man. (*x*)

A power to grant leases for a term of years for new buildings, or effectually re-building and repairing, is not well exercised by a lease containing a covenant to expend a sum of money in effectually repairing. (*y*)

If remainder-man lies by, and permits the tenant to lay out money in building, &c., and may fairly be presumed to

(*v*) Shannon v. Broadstreet, 1 5 Edit.
Scho. & Lef. 52.

(*x*) Coxe v. Day, 13 East, 118.

(*w*) Taylor v. Horde, 1 Burr.
121. Hawkins v. Kemp, 3 East, 410;
but see Sugden on Powers, p. 179.

(*y*) Doe dem. Dymot v. Withers,
2 B. & Ad. 889.

have had notice of the fact, a court of equity will restrain him from controverting the lease, although it may not be maintainable on other grounds. (x)

And as on the one hand a lease may be void at law, and yet maintainable in equity, so on the other hand a lease may be void in equity and good at law; as if a person seised of an estate of inheritance, with directions to grant leases in a particular way, grant leases contrary to his trust, these leases may be valid at law, but liable to be set aside by decree of equity. (a)

If a power to lease be given by will, the lessee will take as if the lease had been made by the deviser himself; and the persons entitled under the limitations of the will will have the benefit of the lessee's covenants as grantees of the reversion. (b)

If a person having a leasing power, make a grant for years out of his estate, he may still make a lease under his power, which will take effect in possession; (c) and if he grant away his whole life estate, he may reserve his powers. (d)

The decisions upon the enabling and disabling statutes will apply to leases which are made under powers in private conveyances, where similar expressions occur in directing the particular form and terms in which such leases are to be framed. Otherwise, however, the construction of the statutes furnishes no more aid in construing private powers, than does the construction of one private power in construing another. For whatever may have been formerly said with regard to powers, and however anxious the Courts may have been to affix a technical meaning to particular

The apparent intention of the creator of the power is the proper criterion in construction.

(x) *Stiles v. Cowper*, 3 Atk. 692.

(a) See *Attorney-General v. Griffiths*, 13 Ves. 565. *Bowes v. London Waterworks' Company*, 3 Mad. 375.

(b) *Whitlock's case*, 8 Co. 14.

(c) *Bringloe v. Goodson*, 4 Bing. N. S. 726.

(d) *Ren v. Bulkeley*, Doug. 292. *Goodtitle v. Funucan*, Doug. 566.

expressions, and to attach importance to the situation of a particular word in a particular sentence, it is now clearly understood that the apparent attention of the parties is to guide the construction of a private power; and to that alone regard is to be had, in order to discover who is authorized to pursue it, and what is to be considered a valid execution of the authority. It follows then that the benefit, both of the tenant for life, and of the remainder-man, is to be looked to; and that care be taken that, while on the one hand the former is allowed to exercise the fair privilege given him by the creator of the power of binding the estate beyond the term of his own life, that privilege be by him so exercised that the estate in remainder be in no manner deteriorated, and no farther bound than the creator of the power intended. (e)

To enter upon the construction of particular powers, and to detail the several decisions as to the extent of their operation and the parties they affect, would exceed the limits of the present treatise. It will be here sufficient to consider the cases in which leases have been held valid or invalid executions of leasing powers; and this with reference, 1. To the subject matter of the demise; 2. To the term granted; 3. To the rent reserved; 4. To the insertion of particular conditions and covenants; and, lastly, To the execution of such leases. It may be proper in this place to premise that where a lease, purporting to be made under a power, is void for an insufficient execution of that power, the acceptance of rent by the remainder-man will not operate as a confirmation; but at most only as an acknowledgment of a subsisting tenancy from year to year. (f)

(e) *Vide* Forster v. Graham, Str. 962. Taylor dem. Atkins v. Horde, Burr. 60. Right dem. Basset v. Thomas, *ibid.* 1441. S. C. Ill. Rep. 446. Ren dem. Hall v. Bulkeley, Dougl. 292. Bringloe v. Goodson, 4 Bing. 726. N. S. Goodtitle dem. Clarges v. Funucan, *ibid.* 565.

Pomery v. Partington, 3 T. R. 665.

(f) Jones dem. Cowper v. Verney, Willes, 169. Doe dem. Martin v. Watts, 7 T. R. 83. Roe dem. Brune v. Prideaux, 10 East, 158. Doe dem. Tucker v. Morse, 1 B. & Ad. 365.

I. In *Tristram v. Lady Baltinglass*, (g) which may be considered as a leading case, the power reserved to the tenant for life, “was to let all or any of the premises aforesaid, *which at any time heretofore have been usually letten or demised*, to any person or persons, for and during the term of one-and-twenty years or under, in possession, and not in reversion; *reserving the rents thereof now yielded or paid* or more, to be yearly due and payable during such lease and leases, &c.” Under this power a lease was made by the tenant for life, including one parcel of land, which had been *once* leased for twenty-one years; which term had expired *more than twenty years* before the making of the power: and the question was, whether this land could be leased under the terms of the power?

I. The subject matter of the demise. 1. What included in the words “premises usually letten.”

The Court decided that the land which had been let but once for twenty-one years was not within the power, not merely because it had been let but once; because the Lord Chief Justice Vaughan agreed, that where lands were let upon a long lease, as for five hundred years, this, though but one demise, would come within the words “*usually demised*,” but they thought that land which was not in lease at the time of the making of the power, nor twenty years before, could not be said to have been *usually demised*. It seems, however, that they rested their judgment mainly upon that part of the power, by which the same rent was to be reserved, as was reserved at *the time of executing* the deed *containing* the power: and therefore, as those lands had then no rent upon them, they concluded that they were not demisable under the power.

Here then arose two questions upon the words “usually demised or letten:” 1. Whether lands let but once,—and, 2. Whether lands which had not been leased for twenty years

(g) Vaugh. 28. S. C. Sir T. Foot v. Marriot, Vin. Abr. *Authority* (G.) pl. 9.
Jones, 27. 1 Freem. 23. And see

before the making of the power,—came within that expression.

As to the first question, it is said in Rolle's *Abridgement*,^(h) that lands which have been thrice or twice let are within the words *usually letten*; but not so lands which have been let but once, for *usus fit ex iteratis actibus*. And so if lands have been leased by one contract from year to year for three years, they are not within the words, because it is but one lease. ⁽ⁱ⁾ But Lord Chief Justice Vaughan dissented from this very narrow distinction, and observed that *usually demised* would also mean the common continuance of land in lease. ^(k) And indeed, as is remarked by Sir Edward Sugden, "the common sense of mankind must revolt at a distinction which considers lands leased for one hundred years as not usually demised, because the term was granted by one deed, but allows land to come within that description which has been let for two years only, on two distinct lettings." ^(l)

2. The case of *Tristram v. Ballinglass* has decided that lands which have not been let within twenty years of the making of that power, cannot be said to have been usually letten. Which decision seems to have been founded upon similar decisions upon the enabling statute; and therefore Sir Edward Sugden observes, that though it remains to be decided within what period the land must have been demised, the Courts might probably incline to fix twenty years as the limit by analogy to that statute. ^(m)

And pursuing the analogy between the decisions upon leases under powers and under the enabling and disabling statutes, it may be concluded that any species of demise, whether for lives, years, or at will, or by whatsoever conveyance, whether by parol, by deed, or copy of Court Roll, will

^(h) 1 Rol. Abr. 261. l. 51.

⁽ⁱ⁾ *Ibid.* 262. l. 3.

^(k) Vaugh. 34.

^(l) Sugd. on Powers, 587, (5th edit.)

^(m) *Ibid.* 588.

come within the words usually letten. (n) And in one case it was expressly decided that a covenant to stand seised was a letting. (o)

The other ground upon which *Tristram v. Baltinglass* was decided, (*viz.* that the power authorized the lands to be let at the rent then reserved, whereas the lands in question had never been let, and consequently this part of the power could not apply to them,) brings us to consider that class of cases in which a general power is given to lease lands, but the clause with respect to the rent to be reserved may be construed into an exception of some particular parts. As in *Comberford's* case, (p) where lands were conveyed to the use of J. S. for life, with power to make leases of the premises, or of any part, *so that such rent were reserved thereupon as had been reserved or paid for it within two years then next before*; and some of the land had not been leased at all within two years. But upon these words the Court held that their generality shewed an *intention* to give the tenant for life power to lease *all the land*; and that he might lease that part which had not been let within two years at what rent he pleased.

2. How affected by directions as to rent.

So where A. made a conveyance of a manor and rectory to the use of himself for life, with remainders over, with a proviso that he might make leases of any part of the premises, for not exceeding three lives, or twenty-one years, reserving for every acre so leased 5s., and that the leases should be good, and continue so long as the tenants did pay the rents, &c., and he made a lease of this rectory, which had no glebe belonging to it; the question was, whether or no this was within his power, because here could be no reservation of 5s. an acre, according to the power; and it was held by *Hale, C. J.*, upon the authority of *Comberford's* case, that

(n) Co. Litt. 44. b. Dean and Chapter of Worcester's case, 6 Rep. 37. Baugh v. Haynes, Cro. Jac. 76.

(o) Right dem. Basset v. Thomas, Bl. Rep. 446. S. C. Burr. 1441.

(p) 1 Rol. Abr. 262. l. 6.

he might make leases of this rectory, reserving what rent he pleased. (q)

In *Winter v. Loveday*, (r) it was decided, that under a power to lease a manor, so as the demise were not of the ancient demesne lands, copyhold could not be leased : but it was said by Lord *Holt*, that under a power to lease a manor and other lands, so as the lease was not of the demesnes, and so as the ancient rent were reserved, the rents and services might be demised *without rent*, because it appeared to be the intent of the settlement that part of the manor might be demised : and, as the demesne lands were not comprised in the power, then the rents and services must be so ; for the whole of the manor consists in demesne, rents and services. And he laid it down as a rule, that *if a man hath a power reserved to him of making leases of two things, and a qualification is annexed to the power which cannot extend to one of these things, he may make a lease of that thing without any regard to the qualification.* And he cited *Comberford's* and *Walker's* cases as authorities for these positions.

But where a settlement was made to the use of A. for life, with power to lease *all or any* of the premises in the said indenture, &c., for any term or number of years not exceeding twenty-one years, at such yearly rents or more, as the same were *then let at* ; and A. made a lease of the capital mansion-house and the demesne lands, which were never leased before ; it was held by the Court of King's Bench, that this was a void lease, notwithstanding the case of *Comberford* on the other side, and the case of *Walker* and *Wakeman* ; and they relied on the case in *Vaughan* as in point, and that here was no *ita quod* as in those cases. (s)

These cases were all cited and amply commented upon by

(q) <i>Wakeman v. Walker</i> , 1	<i>Carth.</i> 427. <i>Ld. Raym.</i> 261. 17
<i>Freem.</i> 413. S. C. (<i>Walker v.</i>	<i>Freem.</i> 507. 2 <i>Salk.</i> 537.
<i>Wakeman</i> ,) 1 <i>Ventr.</i> 294. 2 <i>Lev.</i>	(s) <i>Bagot v. Oughton</i> , <i>Fort.</i> 332.
150. 3 <i>Keb.</i> 544, 595.	S. C. 8 <i>Mod.</i> 249.

(r) *Com. Rep.* 36, 40. S. C.

Lord *Mansfield* in the case of *Goodtitle dem. Clarges v. Furnican*. (t) There the power in a settlement of manors, with a fishery, &c., was, “that it shall be lawful for the tenants for life, respectively from time to time, and at all times during their respective natural lives, and when they shall respectively come into and be in *the actual possession of the aforesaid manors and premises*, by virtue of the limitations aforesaid, by indentures under their hands and seals, to demise all or any of the said manors, messuages, lands, tenements, and hereditaments herein before mentioned or any part thereof, to any person or persons whomsoever, in possession, but not by way of reversion or future interest, for the term of twenty-one years absolute, or any lesser absolute term; or for any term or number of years determinable upon one, two, or three lives, so as upon every such lease or leases respectively there be reserved and made payable during the continuance of such lease or leases respectively, to be incident to, and go along with, the immediate reversion or remainder of the premises so leased, so much, or as great yearly rent as, or more than now is and are paid and yielded, or agreed to be paid and yielded for the same, or proportionably for any part thereof.” A lease being made in pursuance of this power, which included manors and a fishery which had never been leased before; it was objected that this lease was not within the terms of the power, and the case of *Bagot v. Oughton* was relied upon. But the Court of King’s Bench were of opinion that the lease was a good lease; and that the manors and fishery being expressly mentioned in the power, (u) the intent was, that the whole should be leased. And with respect to the case of *Bagot v. Oughton*, Lord *Mansfield* said, “that the nature of the thing shewed that the power could not be meant to extend to letting the ancient manor house at all; much less to letting it without reserving any rent. In a

(t) Dougl. 565.

(u) This does not appear by the statement of the power in the report; but by the judgment of Ld.

Mansfield, and by reference to the original statement of the case. Vide 3 T. R. 671. n. (e).

family settlement, no man could intend to authorize a tenant for life to deprive the representative of the family of the use of the mansion house."

And in a subsequent case, where a man by his will devised his estate in strict settlement, and gave a power to lease *all* or any of the said manors, messuages, lands, tenements, and hereditaments, for lives or years, *so as the usual rents* were reserved; and there were some tithes which were never leased before the making of the will; but some parts of the estate had been usually demised at rents: the Court considered Lord *Mansfield's* observations on *Bagot v. Oughton* to apply most pointedly to the case before them, as the tithes never had been let, but had always been occupied by the possessor of the estate; and they accordingly determined, that the power did not embrace the tithes. (v)

In a still later case decided upon this subject, there was a devise of lands to trustees and their heirs in trust to the use of W. B. B. and his first and other sons in strict settlement, remainder to J. B. and his first and other sons in strict settlement, with power to the trustees from time to time during the minorities of the persons to whom the premises should descend, and to any tenant for life, to grant any lease of *all or any part of the lands so limited, so as there be reserved the ancient and accustomed yearly rent, &c.*: and the Court of King's Bench held, that a lease by W. B. B. of part of the lands devised in several parcels, in one of which parcels were included, together with lands anciently demised, two closes never before demised, at one entire rent, *viz.*, that rent which had been before reserved for the part anciently demised, was void for the whole of the lands included in that parcel, as well the lands never before let as those anciently let; but it was not contended to be void as to the other parcels, which contained only lands anciently de-

(v) *Pomery v. Partington*, 3 T. R. 665.

mised, and on each of which there was a several reservation of the ancient rent. (*w*)

Wherever, therefore, there is a power to lease, so as the accustomed rent be reserved, it is a question of intention depending rather upon the nature of the property than upon the words of the instrument, whether the power is to extend beyond what has been anciently demised. The Courts seem formerly to have involved themselves in perplexity by endeavouring to apply a decision upon one instrument to the construction of another; hence the refinement resorted to in *Bagot v. Oughton* respecting the *ita quod*;—a refinement wholly unnecessary, had the Court ventured upon the same enlarged view of that case, which was subsequently extended to it by Lord *Mansfield* in the judgment in *Goodtitle v. Funucan*.

Where premises have been jointly let by one demise at a gross rent, and the power directs that the letting shall be at the accustomed rent; a part of such premises may be demised, reserving a rent bearing the same proportion to the old rent, that the premises, demised by the new lease, bore to the whole premises formerly demised. (*x*)

In the case of *Winter v. Loveday*, already adverted to, *Holt*, C. J., and *Turton* and *Eyre*, Js., held that an exception in a power of leasing of the demesnes of a manor included the copyholds. But *Rokeby*, J., (who was of a contrary opinion) held that if the demesne lands had *not* been excepted by express words, yet the power would not have extended to them, because it would then destroy the tenure; inasmuch as copyhold lands once leased are for ever enfranchised: and, therefore, it should never be presumed that the

“Demesnes”
by copyholds
are included.

(*w*) Doe dem. *Bartlett v. Rendle*,
3 M. & S. 99.

v. Wilson, 5 B. & A. 363, and see
the same point as to Ecclesiastical
leases, *supra*.

(*x*) Doe dem *Earl of Shrewsbury*

tenure was intended to be destroyed without express words of the parties for that purpose. (y)

Under a power of leasing for one, two, or three lives, or for any term of years determinable on one, two, or three lives, lands then demised for any *such* term—lands are not included which were then held under a demise—“to W. and G. for ninety-nine years, if W. and his widow and any eldest son living or *in ventre sa mere* at the time of his (W.’s) death; or if no son, any eldest daughter then living, or *in ventre sa mere*, or any or either of those three, *viz.*, W., his wife, son, or daughter, should so long live, remainder to G., his widow, son, or daughter in the same manner;” of which description of persons five were in fact living at the time of the power reserved, who were all entitled in succession, three at a time, to come in under the lease;—for under such a general power the three lives must be certain and co-existing. (z)

In the granting of building leases, care should be taken that the quantity of *land* granted is not a fraud on the power. Much will, of course, depend on the circumstances of each particular case, and in some respects, probably, on the custom of the neighbourhood. (a)

The term to be granted.

II. Before we enter upon this head, it is necessary to recall with accuracy the distinction between leases in possession, leases in reversion, and concurrent leases.

Leases in possession take effect *in præsentî*; leases in reversion upon the determination of an existing state: concurrent leases take effect *in præsentî* by estoppel between the parties; but not until the expiration of the original

(y) Carth. 428.

(z) Doe dem Wm. Wyndham v. Halcombe, 7 T. R. 713.

(a) Cooper v. Denne, 4 B. C. C.

80. Higgins v. Rosse, 3 Bli. 112, and see Chance on Powers.

lease, as between the lessee under that, and him under the concurrent lease. (b)

Under a *general* power to lease, no other than a lease in possession can be granted, (c) unless it manifestly appear to have been the intention of the party creating the power that leases in *reversion* or *in futuro* should be granted. As if the land be in lease already, and there be only a reversion in the person creating the power, tenant for life may make leases of those lands in reversion. (d)

But where the power is *expressly* to lease *in possession*, a lease in reversion cannot be granted, although the estate be in lease *at the time of the creation of the power*; so that, unless a present lease can be granted of the reversion, the power is in suspense till the determination of the first lease. Thus, where under a power to make leases "for ninety-nine years, or three lives in possession, or for two lives in possession, and one in reversion, or for one life in possession, and two in reversion;" the party during the continuance of the first lease, made a lease for life to T.: and the question was, whether the latter lease, being made whilst the lives in the former lease were in being, was authorized by the power? By two of the justices (*Wyndham* and *Twysden*) out of three it was held, that had the words of the power been *generally* to make leases, a lease of the reversion, or a lease in reversion, had been within it; but the power being expressly to make leases in possession, the lease in reversion was not within it; and they noticed

(b) *Winter v. Loveday*, Com. Rep. 39, *et vide supra*.

(c) *Countess of Sussex v. Wroth*, Cro. Eliz. 5. *Sheecomb v. Hawkins*, Cro. Jac. 318. S. C. Yelv. 222. 1 Brownl. 148. *Winter v. Loveday*, *ib. sup.* But see *Pollard v. Greenvil*, 1 Ch. Ca. 10. *Marquis of Antrim v. Duke of Buckingham*, *ibid.* 17, and where a prior

lease will in equity be presumed to have been surrendered. *Campbell v. Leach*, Ambl. 740.

(d) *Marquis of Northampton's case*, Dyer, 357. a. S. C. 1 Rol. Abr. 261. l. 15. *Coventry v. Coventry*, Com. Rep. 312. S. C. cited from MS. report in Linclon's Inn library. Sugd. on Powers, 602, 5th edit.

the particular wording of the power to make leases, namely, “for two lives in possession, and one in reversion; or one in possession, and two in reversion;” so that it appeared, that the scope and intent was never to have an estate above three lives in being at one time. (e)

Where the power was to lease for any number of years not exceeding *ninety-nine* from the *time of making the demise*, it was adjudged that the latter words did not refer to the *commencement* of the lease; but only restrained the making of a lease for more than ninety-nine years from the *making*; and that a lease might be made for sixty years, to commence twenty years afterwards; because that would not exceed ninety-nine years *from the time of making the demise*. (f)

The true construction of the power was, that he might lease for ninety-nine years from the time of making the lease, or for any other term not exceeding ninety-nine years. (g)

In another case, where a lease for ninety-nine years, determinable on three lives, was vested in trustees, a power was given to them “to lease the premises as they should think proper, for a term not exceeding twenty-one years, and determinable as the term of ninety-nine years was determinable.” It was held “that such a power authorized only a lease in possession, and not *in futuro*, and the trustees having let the premises for ten years, determinable as in the original lease, and afterwards before the expiration of the ten years, having made a second lease for eleven years, to commence after the first, it was resolved that the second lease was void. (h)

The circumstance of the second lease being granted to the same lessee, who held under the first lease, does not

(e) *Opy v. Thomasius*, 1 Lev. 167. S. C. 1 Sid. 260. Sir T. Raym. 132. 1 Keb. 778, 910. S. P. Doe dem. Sutton, Bart. v. Harvey, 1 B. & C. 426.

(f) *Harcourt v. Pole*, 1 And. 273.

(g) *Vide Sugd. Powers*, 604, 5th edit.

(h) *Shaw v. Summers*, 3 Moore, 196.

operate to make the second a continuance of the first, if made by separate deeds, although the residue of the time to come under the first lease, together with the period of the second lease, do not together exceed the limits of time fixed by the power. (†)

It has been held, that a concurrent chattel lease is good, provided the inheritance be not charged in the whole with a longer term than is authorized by the power. Thus, where under a general power to grant leases *only* for twenty-one years, a lease had been granted for twenty-one years; and afterwards, a year before the expiration of that lease, another was granted of the same premises for twenty-one years, *to begin presently*, it was held that the second lease was good. (k)

Concurrent
leases.

And so where there is a power to grant leases in possession, but not by way of reversion or future interest, a lease *per verba de præsenti* is not contrary to the power, although the estate at the time of granting the lease were held by tenants at will, or from year to year, if at the time they received directions from the grantor of the lease to pay their rent to the lessee. (l)

But a distinction must, it seems, be taken in the case of a subsisting freehold lease, in which case a second freehold lease cannot be granted. (m)

Under a power to demise for twenty-one years in possession, and not in reversion, a lease dated in fact on the 17th of February, 1802, *habendum* from the 25th of March next ensuing the date thereof, was held good, it not having been executed and delivered till after the 25th of March: for the Court agreed that it took effect as a lease in possession, and

(i) Doe dem. Pulteney v. Lady Cavan, 5 T. R. 567. 6 Bro. P. C. 175.

(l) Goodtitle dem. Clarges v. Funucan, Doug. 565. *et vide* Roe v. Prideaux, 10 Cas. 184.

(k) Read v. Nash, 1 Leon. 147.

(m) Roe v. Prideaux, *supra*.

that the period of its commencement would not refer to the 25th March next ensuing the delivery, but that next after *the date actually expressed*. (m) And where a lease is *ante-dated*, and apparently by the date made to commence *in futuro*, it may be shewn that the lease was not in fact executed at the time it bears date, but at or after the day at which it was expressed to commence. (n)

So where one under a power in a marriage settlement to lease for twenty-one years in possession, but not in reversion, granted a lease to his only daughter for twenty-one years, "to commence *from* the day of the date," it was held that the word "from" might be taken either inclusively or exclusively, according to the context and subject matter: for the Courts are to construe so as to effectuate the deeds of parties, and not to destroy them. (o) And though this decision militated against the rule established by previous cases as applicable to leases in general, it has been approved of as properly aiding the intention of the contracting parties. (p)

The grantor of a lease need not be in actual possession, but a constructive possession by the receipt of the rents and profits is a sufficient compliance with the power to lease in possession. If actual possession were necessary, a leasing power could never be executed where the land is in the hands of a tenant; therefore, where a tenant for life, with power to grant leases in possession for twenty-one years, at the best rent, conveyed his life estate to trustees to pay an annuity for his life, and the surplus to himself, the power was held to be not thereby extinguished, but he might still grant a lease agreeably to the terms of the power. (q)

(m) Doe dem. Cox v. Day, 10 East, 427.

(n) Campbell v. Leach, Amb. 740. Doe dem. Reece v. Robson, 15 East, 32. And see Hall v. Caze-
nove, 4 East, 477.

(o) Pugh v. Duke of Leeds, Cowp. 714.

(p) See Rex v. Inhabitants of Gamblingay, 3 T. R. 515.

(q) Ren v. Bulkeley, Doug. 292, et vide Bringloe v. Goodson, *supra*.

Under a power in a will to lease in possession, and not in reversion, a lease for years, executed the 29th of March to the tenant in possession, *habendum* as to the arable from the 13th of February preceding, and as to the pasture from the 5th of April then next, &c., under a yearly rent, payable quarterly, on the 10th of July, 10th of October, 10th of January, and 10th of April, is void for the whole, though such lease be according to the custom of the country, and the same had been before granted by the person creating the power. (*s*)

Where power is given to a man to make leases in possession or reversion, if he lease in possession once, he will be deemed to have made his election, and cannot afterwards make a lease in reversion of the same lands. (*t*)

Where a power authorizes a lease *generally*, it has been already observed that a lease in possession shall be intended; (*u*) such a power, however, may be executed by a *concurrent* chattel lease to commence *in præsenti*; (*v*) but if land is let to C. for ninety-nine years, if he shall so long live, the said term to commence from and immediately after the death of A. and B., two lives in which a subsisting lease for years is to determine, this will be a bad lease, under a general power to lease for ninety-nine years, determinable on one, two, or three lives. (*w*) It is to be observed, that where the power authorizes leases for life in reversion, such power *must* be executed by a concurrent lease, and the expression in the power “lease *in reversion*” shall be construed to mean a concurrent lease, because a freehold lease cannot be made to commence *in futuro*. (*x*)

(*s*) Doe dem. Allan *v.* Calvert, 2 East, 376.

(*t*) *Per* Holt, C. J., in Winter *v.* Loveden, Ld. Raym. 269.

(*u*) *Ante*, p. 187. Read *v.* Nash, 1 Leon. 148.

(*v*) *Ibid.* Berry *v.* Riche, cited Hardr. 412. Goodtitle dem. Clarges *v.* Funucan, Dougl. 572. And see

Fox *v.* Prickwood, Cro. Jac. 347.

Doe dem. Allan *v.* Calvert, 2 East, 376. Doe dem. Brune *v.* Prideaux, 10 East, 184.

(*w*) Doe dem. Coplestone *v.* Hiern, 5 M. & S. 40.

(*x*) *Per* Holt, C. J., in Winter *v.* Loveday, Com. Rep. 39.

A power to grant a lease for two or more lives will authorize a lease for their lives and the life of the survivor. (y) And a lease to three for their three lives would be a good execution of a power to lease to one for three lives, provided the three lives be all *in esse* at the time of making the lease. (x)

So, a power to make leases for thirty-one years, or three lives, is well executed by a lease for three lives or thirty-one years, *which shall last longest*. (a)

In *Whitlock's* case a distinction was taken between "a particular power affirmative, and a general power restrained with a negative;" and it was agreed that a power to lease for three lives or twenty-one years would not authorize a lease for ninety-nine years *if three should so long live*: but that such a lease would be a good execution of a power to lease for a period not exceeding three lives or twenty-one years, because such a lease could not by possibility exceed the time limited by the power, *viz.* three lives. (b)

In *Winter v. Loveday*, (c) a question arose upon a complicated power, whether it authorized a lease for a term absolute or dependant upon lives. The power was to lease, "if in possession for one, two, or three lives, or for the term of thirty years, or for any other number or term of years, determinable upon one, two, or three lives, or in reversion for one or two lives, or for the term of thirty years or for any other number or term of years, determinable on one or two lives." *Rokeby, J.*, held, that a term could only be granted determinable upon lives; but *Holt, C. J.*, *Turton*,

(y) *Alsop v. Pine*, 3 Keb. 44.

(z) *Baugh v. Haynes*, Cro. Jac. 76. *Doe dem. Wyncham v. Halcombe*, 7 T. R. 713.

(a) *Common v. Marshall*, 7 Bro. P. C. 111.

(b) 8 Rep. 70. *b.* This distinction has been questioned, but seems

now to be fully acquiesced in. *Vide Rattle v. Popham*, Str. 992. *Zouch dem. Woolston v. Woolston*, Burr. 1147. *Shannon v. Bradstreet*, 1 Sch. & Lef. 66. *Doe dem. Brune v. Prideaux*, 10 East, 187.

(c) Com. Rep. 36. Cited *supra*

J., and *Eyre, J.*, held, that a lease for thirty years absolutely was good within the proviso.

And where the power was to demise for three lives, or *twenty-one years* or under, or for any term of years upon one, two, or three lives, or as tenant in tail in possession might do, it was held that a lease for ninety-nine years determinable upon three lives was a good execution of the power. (*d*)

In a late case, a power to lease for any term of years not exceeding twenty-one years, or for the life or lives of any one, two, or three persons, so as no greater estate than for three lives be at any one time in being, was held to authorize either a lease not exceeding twenty-one years, or a lease for three lives; but not a lease for ninety-nine years determinable upon three lives, because it might exceed twenty-one years. (*e*)

Where a power is to lease for a given term, a lease for a less term will be a good execution of the power. (*f*) And where a power authorizes a lease for a given term, a lease for such a term, defeasible upon any given event, will be a good lease under the power. (*g*)

Where the lease exceeds the term authorized by the power though it will be void at law, (*h*) it will be supported in equity for so much as is warranted by the power. (*i*)

III. The power usually directs what rent shall be reserved by the leases which it authorizes. This direction must be very accurately observed, or the lease will not be binding on

III. The reservation of rent.

(*d*) *Lutwich v. Piggot*, 3 Mod. 268.

(*e*) *Roe dem. Brune v. Prideaux*, 10 East, 158.

(*f*) *Isherwood v. Oldknow*, 3 M. & S. 382.

(*g*) *Earl of Cardigan v. Montague*, Sugd. on Powers, App. No. 13.

(*h*) *Roe dem. Brune v. Prideaux*, *supra*.

(*i*) *Parry v. Bowen*, 3 Ch. Rep. 6. *Pitt v. Jackson*, 2 Bro. Ch. Rep. 54. *Campbell v. Leach*, Amb. 740. *Alexander v. Alexander*, 2 Ves. 645.

the remainder-man; and it must clearly appear by the instrument itself, that the proper rent has been reserved. (*k*) Formerly powers (following the disabling and enabling statutes) directed that the *ancient* or *accustomed* or *usual* rent should be reserved; but the modern course is to direct a reservation of the *best* or *most* rent that can be obtained.

“Accustomed
rent.”

Upon the first set of words, what has already been said in respect of leases under the disabling and enabling statutes will apply, *mutatis mutandis*, to leases under powers in private conveyances. Referring the reader to these, it is only necessary to remind him, that it seems to be settled, that where a variety of rents has been reserved in successive leases of the same lands, that which was reserved in the *last* lease of the same lands is to be taken as the *ancient* or *accustomed* rent; (*l*) or if the proviso be under such rent, reservations, &c., as are usually reserved in leases of the like kind in the same parish, leases of the same kind in that parish may be given in evidence. (*m*) And provided the ancient rent be reserved, it will not prejudice the lease that no addition is made on account of new buildings, or improvements upon the lands demised. (*n*) So an omission to reserve heriots or mere casual services will not invalidate the lease, (*o*) if only the ancient rent is to be reserved, but the omission will be fatal if the ancient and accustomed reservations are required. (*p*) And where the usual rents are required to be reserved, and a certain sum was formerly paid with a covenant by the lessee to pay all taxes, the reservation of the same sum, without such stipulation, will be a fraud upon the power; (*q*) and so if the

(*k*) *Ker v. Duke of Roxburghe*, 2 Dow. 149.

(*l*) *Doe dem. Douglas v. Lock*, 2 Ad. & El. 705. *Morrice v. Antrobus*, Hardr. 325. *Per Holt*, C. J., in *Orby v. Mohun*, 3 Ch. Rep. 66. *Dub. Cowper*, C. And more than the ancient rent may be reserved, *ibid.* 78.

(*m*) *Doe dem. Douglas v. Lock*, *supra*.

(*n*) *Read v. Nash*, 1 Leon. 148. *Banks v. Brown*, Moore, 759. *Coventry v. Coventry*, Com. Rep. 312.

(*o*) *Baugh v. Haynes*, Cro. Jac. 76. *Coventry v. Coventry*, Com. 312.

(*p*) *Doe dem. Douglas v. Lock*, *supra*.

(*q*) *Earl of Cardigan v. Montague*, Sugd. on Powers, App. (.3) *Goodtitle v. Funucan*, Dougl 565.

exception as to woods be less in the new than in the old lease. (*q*) But a condition for re-entry on the rent being in arrear twenty days, when in the old lease it was twenty-one days, or in case of no distress being on the premises when in the old lease, it was no sufficient overt distress, will not vitiate the lease. (*r*) If two farms have been let at separate rents, it is not safe under a power to let at the ancient rents, to include them in a demise at one rent, although greater in amount than the two former rents. (*s*)

When the power requires the *best* or *most* rent to be taken, it becomes a mere question of fact for a jury to decide whether such rent has been reserved; (*t*) and this seems to be the best rack-rent which the landlord can require *consistently with securing to the estate a substantial and beneficial tenant*; (*u*) without regard to the fact, that other offers were made at a higher rent by persons whose responsibility could not be disputed; (*v*) and further considering upon whom the burthen of repairing, &c., is thrown: (*w*) and where the lessor covenanted, in consideration of a large sum to be laid out by the lessee in the repair of the premises in the first instance, to renew during his, the lessor's life, at the request of the lessee, his executors, &c., on the same terms; it was held that this covenant did not avoid the lease, because it only bound the lessor himself; and if the best rent were not reserved upon such renewal, the lease would be void against the remainder-man. (*x*) But where a power to lease for any term not exceeding ninety-nine years, required the best and most beneficial rent to be reserved, and the tenant for life executed two leases, the first of which reserved a rent of

"Best rent."

(*q*) Doe dem. Douglas v. Lock, 2 Ad. & El. 705. 4 Nev. & M. 807.

(*r*) *Ibid.*

(*s*) Sugd. on Powers, 5 edit. 634, *et vide*, Doe dem. Williams v. Matthews, 2 Nev. & M. 264.

(*t*) Wright v. Smith, 5 Esp. 203. Doe dem. Lawton v. Radcliffe, 10

East, 278. Doe dem. Rogers v. Rogers, 2 Nev. & M. 550. 5 B. & Ad. 755.

(*u*) *Ibid.*

(*v*) Doe v. Radcliffe, *supra*.

(*w*) Doe dem. Bromley v. Bettison, 12 East, 309.

(*x*) *Ibid.* 310.

270*l.* for the term of thirty years, and the second reserved only 120*l.* for the sixty-three years to follow; and by a clause in the second lease the tenant was bound to rebuild, either before the expiration of the first term, or within the first year of the second; the Court intimated, that though the rents reserved by the two leases might have been the most beneficial, as between the lessor and the lessee, yet they would not be so accounted as between the tenant for life and the reversioner; and that upon that account the second lease was void. (x)

Where the jury have found that the best rent has been reserved, it is no ground for impeaching their verdict, that the last tenant for life received two offers of a higher rent from responsible tenants, unless it can be shewn that the present tenant for life has been guilty of unfair conduct, or that there is something extravagantly wrong in the bargain. y)

In a power to grant building leases, the term “best rent” must, although not so expressed, be understood to mean the best rent which can be obtained, with reference to the gross sum to be laid out by the tenant in building and improvements. (z)

A fine cannot
be taken.

If, under a direction to take the *best* rent, the tenant reserve a rent, and either receive a fine from the tenant upon his admission to the premises, or stipulate for one upon the happening of a particular event, he cannot be said to have reserved the best rent; because it necessarily follows that where the tenant pays a fine, his rent will be less in proportion; and therefore the ultimate benefit of the remainderman will be compromised for the present emolument of the tenant for life. The taking of a fine is therefore a sufficient ground to invalidate the lease. (a) And where the *usual* rent is directed to be reserved, a fine can only be sanctioned

(x) Doe dem. Sutton Bart. v. Harvey, 1 B. & C. 426. 2 Dowl. & Ryl. 589.

(y) Doe v. Radcliffe, *supra*.

(z) Vide Sugd. on Powers, 5 edit. 627.

(a) Vide Doe v. Radcliffe, *supra*.

by proof that the premises have invariably been leased under similar terms. (b) As where a power authorized tenant for life to make leases in Sussex at the *most* rent, and leases in Middlesex at *the usual or other the most rent*, and the tenant made a lease of the lands in Middlesex upon a fine, reserving a rent which exceeded the rent reserved upon a former lease in being at the making of the power, and upon which lease the then lessor had also taken a fine; the second lease was held good under the power; as the very difference in the terms in the power, directing the rents to be reserved, shewed that the maker of the power meant to give the tenant the benefit of the fine usually taken. (c)

The surrender of an existing lease, and the grant of a new one at an improved rent, is not equivalent to taking a fine. (d) But if tenant for life, bound to reserve the best rents, lets the premises on a repairing lease, and after the improvements have taken place accepts a surrender, and grants a fresh term, he must reserve the best rent that can be then obtained. (e)

Where a power expressly prohibited the tenant for life from receiving a fine or fore-hand gift, and it was found that a lease was granted on the 15th of October, to commence as to meadow, from the 13th of February last, as to pasturage, from the 25th of March, and as to the messuage from the 12th of May, at a certain rent, payable half-yearly, on the 11th of November and 25th of March, and the first half-year's rent to be payable on the 11th of November then next being twenty-seven days after the date of the lease; the Court of King's Bench refused to presume that this was by way of fore-gift in fraud of the power, and considered

(b) Right dem. Basset v. Thomas, Burr. 1441. S. C. Bl. Rep. 446.

(c) Doe dem. Newnham v. Creed, 4 M. & S. 371. In this case Dampier, J., said that he had always considered *usual* in powers as con-

trasted to *most*, *ibid.* 378.

(d) *Vide* Sugd. on Powers, 627, 5 edit.

(e) Doe dem. Griffiths v. Lloyd, 3 Esp. 78.

it merely as a compensation for the antecedent enjoyment. (*f*)

And where a power directed that there should be reserved "the *accustomed* yearly rent," and a lease was made on the 6th January, reserving the yearly rent of 50*l.* upon the 25th March and the 29th September, the first payment to be made on the 25th March next ensuing; the Court overruled the objection that there was here a fore-hand rent, because it appeared, upon referring to former leases, that the rent had been accustomed to be made payable upon those days. (*g*)

The last half-year's rent may be reserved on a day between the end of the preceding half-year and the expiration of the lease. (*h*)

Improvements made by the tenant will not authorise a lease at an undervalue; (*i*) although if tenant for life, with a power to grant building leases, enter into articles to make a lease pursuant to the power, this will be valid, and will bind the remainder man. (*k*)

In a case before Lord *Redesdale*, the tenant covenanted to lay out 200*l.* in *improvements*; and it was argued that this was equivalent to a fine: but his lordship said that he thought this would not avoid the contract if the rent were notwithstanding the best that could be got. "Such a covenant," he added, "is not necessarily a fraud. It may be made with a fraudulent intent; and, when it is so made, it will avoid the lease. If it were colourable, and merely for

(*f*) *Isherwood v. Oldknow*, 3 M. & S. 382.

(*g*) *Doe dem. Earl of Shrewsbury v. Wilson*, 5 B. & A. 363, *et vide Doe dem. Wilmot v. Gifford*, 5 B. & A. 371. *Doe dem. Harries v. Morse*, 2 Crompt. & Mees. 247.

(*h*) *Doe dem. Wythe v. Rutland*, 2 Mees. & W. 661.

(*i*) *Roe dem. Bulkeley v. Archbishop of York*, 6 East, 86. *Doe dem. Griffiths v. Lloyd*, 3 Esp. 78.

(*k*) *Shannon v. Bradstreet*, 1 Scho. & Lef. 52.

the purpose of putting money into the pocket of the tenant for life, it would avoid the lease; or if it were not intended originally as a fraud, but were afterwards used fraudulently, as for example, a covenant to repair, and a sum of money under colour of damages for breach of that covenant recovered by the tenant for life, a court of equity would at least take care that the damages should be laid out on the lands." (l)

Under a power to lease with or without fine, rendering such rents as the tenant for life should think fit, it was held that a lease reserving *no rent* was a good execution of the power; though it seems it would have been otherwise had the power been, reserving such *yearly* rents. (m)

When a rent is reserved under a power to lease, it is necessary that the reservation be stated with certainty, so as to enable the remainder-man to demand his *quantum* of rent without difficulty. And therefore, in the great case of *Orby v. Mohun*, where tenant for life, with power to make leases of all lands anciently demised, reserving the most and best improved rents, made a lease with a reservation in the words of the power of *such sum of money as should amount to the best and most improved yearly rents*, Lord Cowper, C. and Trevor, C. J., decided that the lease was void against the remainder-man for its uncertainty, contrary to the opinion of Holt, C. J. (n) And their decision was afterwards affirmed upon error in the House of Lords. (o)

The reservation must be certain.

But in that case it was agreed that if there be any thing in the reservation by which the amount of the rent may be ascertained, this will be as good as if the sum itself were specified in the reservation; upon the maxim *id certum est quod certum reddi potest*. Therefore, where a power was by a settlement to make leases of lands anciently demised,

(l) Shannon v. Bradstreet, *supra*.

(m) Talbot v. Tipper, Skin. 427.

(n) Orby v. Mohun, 3 Ch. Rep. 56. S. C. 2 Freem. 291. 2 Vern. 531, 542. But see Audley v. Audley, 2 Ch. Rep. 82, which seems

very imperfectly reported.

(o) 3 Br. Parl. Ca. *nom.* Duchess of Hamilton v. Mordaunt, 248. And see Ker v. Duke of Roxburghe, *supra*.

reserving at least 12*d.* for every Cheshire acre; and a lease was made of all the lands anciently demised, reserving all the rent intended to be reserved: though these words were allowed to be very general and uncertain in themselves, the reservation was held good, because it might easily be ascertained by the reference of the 12*d.* at least for every Cheshire acre, it being known what a Cheshire acre is; a fact not depending upon uncertain evidence, but at all time ascertainable by admeasurement. (*p*)

So where in a lease under a power to lease at the best rent, it is impossible, from the *quantity and nature* of the property demised, to ascertain whether the rent reserved be the best rent, the execution of the power cannot be supported. As where a donee of a power to lease at rack-rent leased an honour and sixteen manors and other estates, with a park and deer therein, by one lease at 600*l.* a-year, the lease was deemed invalid, by reason of the general, extensive, casual, and uncertain natures and values of the greater part at least of the premises, and the great difficulty, if not utter impossibility arising from thence of forming any judgment, whether the rent thereby reserved were the best rent that could have been obtained. (*q*)

Under a power to reserve the *accustomed* rent, one kind of rent cannot be substituted for another. (*r*) But under a power to reserve the *best* rent, it is not necessary that *money* should be reserved; any other thing, of which the value may be ascertained, will serve equally well; as, upon a demise of mines, a portion of the ore produced. (*s*)

Where the power requires the rent to be reserved at particular days, it must be reserved accordingly: but where it merely requires the *yearly* accustomed rent to be reserved, the annual rent may be made payable quarterly, or

(*p*) *Lewson v. Piggot*, cited 3 Ch. Rep. 61.

(*q*) See *Earl of Cardigan v. Montague*, Sugd. on Powers, App. (15.)

(*r*) *Mountjoy's case*, 5 Rep. 5. S. C. Moore, 197, *et vide supra*.

(*s*) *Campbell v. Leach*, Amb. 740.

at any other period of the year, or upon a day before the year is up. (t) And so where the power directed that there should "be reserved and made payable yearly a certain rent, and the rent was made payable half-yearly, the Court held this reservation good, and that the word *yearly* meant only the payment of rent in the year. (u)

In the reservation of the rent, the most clear and sure way is to reserve it yearly during the term, leaving the law to make the distribution without an express reservation to any one. (v) But if the reservation be to the tenant for life and his heirs, or to the tenant for life and every person to whom the inheritance or reversion of the premises shall appertain, it is good. (w)

Covenants entered into with the donee under the power, his heirs and assigns will, by force of the 32 Hen. VIII., enure to the remainder-man, who may maintain an action on them. (x)

A joint demise of two parcels of land reserving rent *jointly*, the letting of one portion of which is either unauthorized by, or contrary to, the directions of the power, will be void *in toto*; (y) but it is otherwise if the reservation be several, although the demise be joint. (z) And when opened and unopened mines were demised by one deed, reserving generally *a certain proportion of the produce*, and it was held that the unopened mines could not be demised under the power; the Court were nevertheless of opinion, that the lease was good for the opened mines;

Where a joint reservation, upon a lease including lands not authorized to be demised, avoids the whole.

(t) *Per Powell, J., acc. Holt, C. J., in Regina v. Weston, Lord Raym. 1198. Campbell v. Leach, ub. sup.*

(u) *Doe dem. Earl of Shrewsbury v. Wilson, 5 B. & A. 363.*

(v) *Whitlock's case, 8 Rep. 70.*

(w) *Whitlock's case, supra. 1 Brownl. 169. And. 278. Campbell v. Leach, supra, p.*

(x) *Isherwood v. Oldknow, 3 M. & S. 382.*

(y) *Mountjoy's case, 5 Rep. 3. b. How v. Whitfield, 1 Vent. 339. S. C. Sir T. Jones, 110. Earl of Cardigan v. Montague, cited sup. Rees dem. Perkins v. Philip, Whightw. 69. Doe dem. Griffiths v. Lloyd, 3 Esp. 78. Doe dem. Bartlett v. Rendle, 3 M. & S. 99. Doe dem. Williams v. Matthews, 2 Nev. & Man. 264.*

(z) *Ibid.*

because there was not a gross sum reserved for the whole, but the reservation was of the produce, which could only apply to one class, *viz.*, the opened mines. (a)

And where a joint demise was made at one entire rent of lands, of part of which the lessor was seised in fee, and of the other part of which he was merely tenant for life, with power to lease, and the lease was void because not conformable to the power; it was held that the lease was good for the lands in fee, though not for the other lands, and that the rent might be apportioned. (b)

It has been considered that two farms, not usually let together, cannot be joined together in one demise, at one and the same rent, or a parcel of a farm be demised, rendering rent *pro rata*. (c) As to ecclesiastical leases, this appears to have been the law prior to the statute of the 39 and 40 Geo. III. c. 41, which extends only to ecclesiastical leases, and does not even assist the leases of tenant in tail, or of husbands seised *jure uxoris*. Whether such leases under powers in private assurances can be maintained, is a question by no means settled. (d)

IV. Particular covenants and conditions.

1. Re-entry for non-payment of rent.

IV. To enforce the payment of the rent, the power usually requires that the lease should contain a clause of re-entry. Where the power directs *in general terms* that such a clause shall be inserted, it has been a question whether the lease must contain an absolute, unconditional, unqualified proviso for immediate re-entry upon non-payment of the rent, or whether the lessor may exercise a discretion in postponing the re-entry until after a certain number of days.

The first case that occurred upon this subject arose upon

(a) Campbell v. Leach, Amb. 740.

(b) Doe dem. Vaughan v. Meyler, 2 M. & S. 276.

(c) 5 Co. l. 3. Cha. Rep. 75.

Smith v. Trinder, Cro. Car. 22. Sugd. on Powers, 634. 5 edit.

(d) Vide. Doe v. Wilson, 5 B. & C. 363.

a power which directed a clause of re-entry on non-payment of the rent for one and twenty days. The lease in execution of this power contained a clause of re-entry in case the rent should be behind for one and twenty days, *having been lawfully demanded, and no sufficient distress*. But though the lease super-added the necessity of demanding the rent, and searching the premises for a distress, Lord *Mansfield*, and the Court of King's Bench were of opinion that the lease was a good execution of the power. (d)

On the other hand, where a power directed a clause of re-entry precisely the same as that in *Hotley v. Scott*, and the lease super-added the same necessity of a demand and absence of a sufficient distress, the Court of King's Bench (Lord *Ellenborough*, C. J.) certified to the Master of the Rolls, who had directed the case for the opinion of the Court, that the lease was *not* made in conformity to the power. (e) It is remarkable, that in this last case *Hotley v. Scott* was not mentioned.

The question was again raised in a case in which it received great consideration. A power was given under a settlement, "from time to time by indenture, to demise such premises as were then leased for lives, or for years determinable on lives, to any persons in possession or reversion for one, two, or three lives, so as there were not thereon any greater estate or interest subsisting at any one time, than what would be determinable on the dropping of three lives; and so as there were reserved the ancient and accustomed yearly rents, duties, and services or more; or as great or beneficial rents, duties, and services or more; or a just proportion of such ancient or the then reserved rents, &c.; (except heriots, which might be varied at will;) *and so as there were contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved*; and also

(d) *Hotley v. Scott*, cited from Lofft. 316.

^a MS. note of Mr. Butler, 1 Br. & C. 150. S. C. imperfectly reported, (e) *Coxe v. Day*, 13 East, 118.

by indenture to demise any of the premises for any term absolute, not exceeding twenty-one years in possession, and not in reversion, so as there were reserved so much or as great and beneficial yearly and other rent and rents, and other services proportionably, as then were therefore paid and yielded, or the best and most improved yearly rent and rents that could be reasonably had or obtained for the same without taking any fine; *and so as in every such lease there were contained a clause of re-entry in case the rents reserved were unpaid by the space of twenty-eight days*;—and also, by indenture to demise any of the premises wherein or whereupon any mine or mines should be open, or any person should be willing to open any mine, for any term not exceeding thirty-one years in possession, so as upon every such lease there were reserved such share of the produce, or such yearly rent as could reasonably be obtained without taking any fine, and so as the lessees were not by any express clause freed from impeachment of waste, other than in the necessary and reasonable working thereof; and so as there were inserted such proper and usual covenants for the effectually winning and working the mines, and smelting the ore, and doing other acts, as were usually inserted in leases of the like nature.” The lands in the declaration mentioned had been and were leased, and were under and subject to a lease for a term of years determinable on lives. The husband, after the marriage, by indenture, in consideration of the former lease, and of 105*l.* and of the yearly rents, duties, payments, services, articles, covenants, provisoes, and agreements therein after specified and reserved on the part of the lessees, demised the lands in question for ninety-nine years, if three persons or either of them should so long live, paying the yearly rent of 2*l.* by equal portions at *Michaelmas* and *Lady-day*, with a couple of fat capons, or 1*s.* 6*d.* in lieu thereof at the election of the lessor, and also an heriot of the best beast, or 40*s.* in lieu thereof, upon the death of every tenant dying in possession; and the like upon every assignment, sale, forfeiture, or alienation; and also the lessees yielding and doing constant suit of mill, paying such toll and mulcture

as others grinding their corn there should pay. The lease contained a covenant by the lessees to pay the yearly rent of 2*l.* and the duties, heriots, suits, services, and other reservations, at the time and in the manner limited and appointed for payment and performance of the same, or else the several sums reserved in lieu thereof; *with a proviso, that if at any time the rent of 2*l.* and every or any of the duties, services, reservations, and payments thereby reserved, or any part should be unpaid or undone by fifteen days next over or after any of the times whereat or whereupon the same ought to be paid, done, or performed, and no sufficient distress or distresses could or might be taken upon the premises, or if the lessees should leave the premises in decay six months after view had and notice given, or should commit any wilful waste, or grind their corn at any other mill, (the lessor's mill being in repair) or if the lessees should assign without licence, or if any default should be by the lessees made in the payment or performance of all or any of the reservations, covenants, and agreements thereinbefore, on their parts contained; then the lessor, and the person to whom the freehold of the premises should belong, might re-enter.* Upon the trial of an ejectment, evidence was received that the usual and accustomed form of leases of the estate contained in the marriage settlement, for lives or years determinable on lives, as well prior as subsequent to that settlement, was with a conditional proviso of re-entry similar to that in this indenture; and upon special verdict, the Court of King's Bench having decided that the lease was a due execution of the power, a writ of error was brought in the Court of Exchequer Chamber. The question having been twice argued, the judgment of the Court below was reversed by the opinion of four judges against three. But upon a writ of error, the House of Lords reversed the judgment of the Court of Exchequer Chamber, thereby confirming that of the Court of King's Bench. (*f*)

(*f*) Doe dem. Earl of Jersey — Judgment of the Exchequer Chamber, (for the leases, Dallas, C. J., v. Smith. See the judgment of the Court of K. B. 5 M. & S. 467. Richards, C. B., Park, J., and Bur-

In a case decided subsequently in the Court of King's Bench, the power directed the *accustomed* rent to be reserved yearly, and that there should be a condition of re-entry for non-payment; a lease executed in pursuance of the power contained a proviso that in case the rent were in arrear at the day stipulated for its payment, *after reasonable demand* the lessor, his heirs, &c., might re-enter and distrain, and take away the distress, and keep it till the rent was satisfied; and in case the rent should be unpaid for the space of twenty-eight days after it became due, being lawfully demanded, the lessor, &c., might re-enter:—it was decided that the power was well executed; that the clause for entering, after reasonable demand, and distraining and keeping the distress, did not oust the lessor of his common law right of distress, or of his right to sell under the stat. Will. and Mary; and that the power of re-entry *after twenty-eight days* was well inserted, and in conformity to the old leases; acting upon the doctrine laid down in *Doe and Smith*, that the former leases may be received in evidence to shew the accustomed form of demising. (*g*)

In the preceding case it was held first, that it was not a valid objection to the lease, that the rent was made payable on the 25th of March and 29th September; although the term commenced on the 6th of January, and therefore there was a fore-hand rent which might prejudice the remainder-man, inasmuch as the rent was made payable on the same day, by a former lease, and therefore this was the usual and accustomed rent.

And secondly, for the same reason that it was no objection

rough, J.; against them, Graham, B., Wood, B., and Garrow, B.,) 1 B. & B. 97. Judgment in Dom. Proc. For the leases, the Lord Chancellor, Lord Redesdale, Abbot, C. J., Richards, C. B., Graham, B., Wood, B., Bayley, J., Garrow, B., Best, J.; against them, Dallas, C. J., Park, J., Burrough,

C. J. Holroyd, J. and Richardson. J. 2 B. & B. 473. And see the case reported at length, 7 Price, 281.

(*g*) *Doe dem. Earl of Shrewsbury v. Wilson*, 5 B. & A. 363. And see *Doe dem. Bligh v. Colman*, 1 Bing. 30.

to the lease that the rent was made payable by half-yearly payments, although the power required it to be payable yearly, the term yearly meaning a payment of rent *in the year*.

And thirdly, that it was no objection to the lease, that by the terms of it, the landlord could distrain only after a reasonable demand, and that he was bound to detain the distress until the rent was satisfied; for this being a clause introduced for his benefit, he was not thereby abridged of any right of distress, which he had by common law or of sale under the statute 4 & 5 Wm. and Mary.

And fourthly, that it was no objection to the lease that the clause of re-entry reserved the right of entry to the landlord, upon the rent being twenty-eight days in arrear; for this was a reasonable condition of re-entry, and was conformable to the old lease. Nor was it any objection that the right of re-entry was made to depend upon the rents being lawfully demanded, for the landlord was not thereby deprived of the benefit of the 4 Geo. II. c. 28; and, consequently might enter without making any demand.

And lastly, that part of the premises formerly demised jointly with others, at one entire rent, might be let under the terms of this power, at a rent bearing the same proportion to the old rent, that the premises demised by the lease bore to the whole premises formerly demised.

In another case the power required the insertion in the lease of a clause of re-entry, if the rent should be in arrear for twenty-one days, the clause actually inserted gave a power of re-entry, if the rent should be in arrear for twenty-one days, and no sufficient distress could be had; and it was held valid. (*h*) The question, may perhaps, be considered, as set at rest by a late case, in which the direction was, that in every lease there should be contained a clause of re-entry for the

(*h*) *Tankerville v. Wingfield*, 2 B. & B. 498, n. 7 Price, 343. 5 Moore, 346.

payment of the rent or rents to be thereby respectively reserved. A lease was granted, with a proviso for re-entry, if the rent should be in arrear for *forty-two* days, and was held to be a valid execution of the power. (i)

Waste.

Another common direction in powers is, that the lease shall not make the tenant dispunishable for waste. Such a direction is not contravened by the lessor taking upon himself the burthen of the repairs. (k)

Usual covenants.

Powers frequently require that *usual* covenants should be inserted in the lease. What these usual covenants are, is in general a question for the jury. And, accordingly, when under a power to lease for years, reserving the usual covenants, tenant for life made a lease containing a proviso that, in case the premises were blown down or burned, the lessor should re-build, otherwise the rent should cease, the jury found that it was an *unusual and unheard-of covenant*. (l) But where, in an act of parliament to *enable A. to grant building leases*, it was directed that leases should contain *usual and reasonable covenants*, and in a lease made in pursuance of this act the lessee covenanted to keep the old buildings in repair, and to repair such other messuages or buildings as should during the term be built on the premises, the Court of Common Pleas decided that this was not a building lease under the power contained in the act; for a covenant to build must be a reasonable covenant in a building lease. (m)

(i) Doe dem. Wythe v. Rutland, 2 Mee. & Wels. 661.

(k) Doe dem. Bromley v. Bet-tison, 12 East, 305. In Campbell v. Leach, Amb. 740, where there was a demise of opened and un-opened mines, it was contended that the lease was void, because the power required that the lessee should not be made dispunishable for waste; and to open mines is waste. To which it was answered,

that all the mines were included in the power; and therefore Lord Holt's rule (before cited) applied, "That where a qualification is annexed to a power of leasing, which, if observed, goes in destruction of the power, the law will dispense with such qualification."

(l) Doe dem. Ellis v. Sandham, 1 T. R. 705.

(m) Jones dem. Cowper v. Verney, Willes, 169.

In the case of the *Earl of Cardigan v. Montague*, (n) it was held by Lord *Hardwicke*, that in a power directing the reservation of the ancient rent, *boons*, &c., the word “boons” included a covenant to repair; and that a lease, purporting to be executed under this power, but omitting such covenant, was void.

Where the lease omits any usual and proper covenant, it is void for the whole; and so, where an improper covenant is inserted, as that in case the premises are blown or burnt down, the lessor shall repair, otherwise the rent shall cease; such covenant cannot be rejected, but the lease is altogether tainted, and void *in toto*. (o) But the insertion of an unusual covenant, binding only on the tenant for life, will not, it seems, avoid the lease. (p)

When the power is silent as to the covenants to be inserted in the lease, it is necessary, in order to impeach such lease, upon the ground of the insertion of a particular covenant, to shew that it was inserted in fraud of the power; (q) and therefore, if the covenants are such as to leave the parties on the same footing as under former leases, (as where it appeared that what was thrown on the landlord was compensated by what was paid by the tenant,) this difference in trivial circumstances will not avoid the lease.

And where, under a power in a will, “to demise and lease such parts of the testator’s premises as had been usually granted or demised, and were then in lease, for any term of years determinable on lives to any persons for the like terms, and in like manner, and under the like rents, services, and conditions, as the same had been usually granted; and the residue of the same premises unto any persons for any term of years not exceeding twenty-one years in possession,

(n) *Supra*.

East, 305.

(o) *Doe dem. Ellis v. Sandham*,
1 T. R. 705.(q) *Goodtitle dem. Clarges v.*
Funucan, Dougl. 565.(p) *Vide Doe v. Bettison*, 12

at the best and most improved rent that could be reasonably gotten for the same, so as that *no such demise or lease* should be made dispunishable of waste, nor without a condition of re-entry on non-payment of the rent and services thereby reserved, and so as each lessee should execute a counterpart of his lease." It was held that the word "such" could not be thrown back, so as to apply to or govern the first class of the testator's premises, which had been usually let and were then in lease; but must be confined to the latter class of property, *vis.*, the residue of the premises, for the leasing of which the testator had given separate and specific directions. (r)

Powers in
building leases.

The common power to grant building leases will not authorize the laying out of roads, squares, mews, or the like, which are subjects of reservation rather than of lease. It may, in some cases, be advisable to add to the usual language of the power words authorizing these purposes. In some instances an application to Parliament has been found necessary to remedy the defect. (s)

V. Execution
of the lease.

V. Lastly, where the power directs the particular manner in which the lease is to be executed, this direction must appear to have been exactly pursued. As if the deed be required to be under the *hand* and seal of the lessor, *attested by* witnesses, and the attestation be only "*sealed* and delivered in the presence," &c., the deed will be void. Nor will a subsequent attestation of the *signing*, sealing, and delivery, supply the original defect; since the attestation ought to be a part of the same transaction with the execution of the deed. (t) Nor can such defective attestation be supplied by the parol evidence of the attesting witnesses, that the deed was actually executed pursuant to the power. (u) By an act of the legis-

(r) Doe dem. Bligh v. Coleman, 1 Bingh. 28. 7 Moore, 271.

(s) *Vide* App.

(t) Wright v. Wakeford, 4 Taunt. 213. Doe dem. Mansfield v. Peach, 2 M. & S. 576. Wright v. Barlow,

3 M. & S. 512; *et vide* Moody v. Reid, 1 Madd. 516. Hougham v. Sandys, 2 Sim. 95.

(u) Doe dem. Hotchkiss v. Pierce, 2 Marsh. 102. S. C. 6 Taunt 402. Wright v. Wakeford, *supra*.

lature, the defect in the attestation of the fact of *signing* an instrument then executed is remedied, but it does not extend to other defects in the attestation, and it is not prospective. (v)

It has been already stated, that where the lease is not executed by the tenant for life pursuant to the power, it is *ipso facto* void as against the remainder-man, and no act of confirmation by him can afterwards set it up. Accordingly, where by a marriage settlement the husband had the wife's estate for life, with power to grant leases for twenty-one years, but no longer; and in breach of the power he granted a lease to A. for ninety-nine years, determinable upon lives; and the wife survived him, and conveyed the fee to B.; although in the conveyance the lease to A. was recited, and he was recognized therein as then being tenant in possession of the estate, at the yearly rent reserved: yet upon an ejectment being brought by B. against the assignees of the lease: it was held that the lease being void, and the recital being only matter of description, no demand of possession was necessary to sustain the action. (w)

In the usual power for leasing, it is commonly required, except in a building lease, that the lessee shall not be made punishable for waste, and that he execute a counterpart. If these requisitions are not complied with the lease will be void, (x) and it would even seem, that where the power is silent as to the conditions, such conditions as are usually made requisite in powers of leasing would be considered implied, unless a contrary intention was shewn in the instrument creating the power. (y)

In the case of building leases, a clause against waste will, it should seem, be deemed repugnant. (z)

(v) 54 Geo. III. c. 168.

Key, Willes, 169.

(w) Doe dem. Biggs v. White, 2 Dowl. & Ry. 716.

(y) Taylor v. Horde, 1 Burr. 125.

(x) Jones dem. Cowper v. Ver-

(z) Campbell v. Leach, Amb. 740.

Sugd. on Powers, 5th edit. 658.

BOOK THE SECOND.

CHAPTER THE FIRST.

OF THE RIGHTS AND LIABILITIES OF LANDLORD AND TENANT.

THE demise being accomplished, and the relation of landlord and tenant thereby created, certain rights and liabilities appertain to either party, not only in respect of each other, but also in respect of third persons who are strangers to the contract: for even against strangers there are rights which the lessor still retains, though divested of the present possession of the premises; and there are rights which the tenant acquires as soon as he is clothed with that character, and before he takes possession: and so, on the other hand, there are strangers to whom the lessor may still remain liable, and to whom the lessee may become responsible although not in possession.

When these
rights, &c.,
attach.

The rights and liabilities of landlord and tenant attach, in the case of a lease for life, upon the completion of the demise by livery of seisin, or other conveyance requisite to the passing of a freehold. But in the case of a lease for term of years, rights and liabilities attach even before the demise is perfected; and though, in order to carry into execution the contract between the lessor and lessee, it is necessary that the lessee should actually enter, yet immediately upon the making of the contract, and before entry, the lessee acquires a vested interest in the term, whether the lease be to commence in *præsenti*, or in *futuro*. (a)

(a) Co. Lit. 46. b.

This interest is called his *interesse termini*. This he may assign or underlet, even though the term be not to commence until a future day. (b) If he die before entry, his executor or administrator may enter: (c) or if a lease for years be granted to several persons, and one of them die before entry, his interest survives to the rest. (d) And so, though the lessor die before the entry of the lessee, the lessee or his executor may nevertheless enter. (e)

Nor will the wrongful intrusion of a stranger defeat the lessee's *interesse termini*. Therefore, if a lease be made to A. to commence at Christmas, and before Christmas a stranger disseise the lessor, the right of the lessee will remain unaltered, and be assignable by him. (f)

So, on the other hand, the lessee will be liable upon the covenants from the time the term commences, although he neglect to enter. (g)

But lessee for years has not such an estate as will enable him before entry to take a release from the lessor so as to enlarge his estate, though such a release will operate as an extinguishment of the rent reserved. (h) Where, however, a lease is granted to two persons, the one may release to the other before entry. (i)

(b) Co. Lit. 46. b. 270. b. Wheeler v. Twogood, 1 Leon. 118. S. C. (Wheeler v. Thorogood) Cro. Eliz. 127. *Supra*, p. 7.

(c) Co. Lit. 46. b.

(d) *Ibid.*

(e) Lit. s. 66. Co. Lit. 46. b.

(f) Bruerton v. Rainsford, Cro. Eliz. 15. *Secus*, if he had entered, and then been evicted, Saffyn's case, 5 Rep. 124. b. S. C. (Saffyn v.

Adams,) Cro. Jac. 60: except he be the lessee of the crown, Wyn-gate v. Marke, Cro. Eliz. 275.

(g) Bellasis v. Burbriche, Lord Raym. 171. S. C. 1 Salk. 209. Holt, 199.

(h) Co. Lit. 270. a. b. Barker v. Keat, 2 Mod. 252; *et vide supra*, p. 8.

(i) Co. Lit. 270. a.

CHAPTER THE SECOND.

Of the Rights and Liabilities of Landlord and Tenant in respect of each other.

THE rights and liabilities of landlord and tenant, as against each other, arising almost exclusively out of their covenants, either implied or expressed, it belongs to this division of the subject to consider the nature of each particular covenant; and what will amount to a breach thereof,

SECTION I.

OF THE COVENANTS ON THE PART OF THE LESSOR.

1. Covenant
for quiet en-
joyment im-
plied by law,

I. The principal covenant, on the part of the landlord, is the covenant for title and quiet enjoyment. This is implied by the law upon the words *dedi, concessi, demisi, or assignavi*; for when a demise is made by these words, the law supposes that the lessor has title to the land, &c. he demises, and consequently power to lease; and therefore it immediately implies an undertaking on his part, that the lessee shall quietly enjoy the land; if the lease be for life, against all men; if only for years, against all persons having title either paramount to, or through the lessor. (a) But against the acts of strangers, the law upon a lease for years raises no undertaking; and therefore if the lessee be ousted

(a) See Platt on Covenants, 46. Moore & Sc. 599. Hancock v. 2 Bac. Abr. Cov. B. 65. Adams v. Coffyn, 1 Moore & Sc. 521, 8 Bing. 358. Gibney, 6 Bing. 666; *et vide* Woodhouse v. Jenkins, 9 Bing. 431.

by one who has no title, the law leaves him to his remedy against the wrong doer. (b)

The word demise implies a covenant for title as well as a covenant for quiet enjoyment. (c)

So when a lease is made of a thing, the law implies a covenant by the lessor, that the lessee shall have the free use of it; and therefore, if a man grant by deed a water-course and stop it; or if a lease be made of a house and estovers, and the lessor destroy all the wood; in both these cases, the lessee may maintain an action of covenant. (d) And, therefore, where the lessor, after a demise of certain premises with a portion of an adjoining yard, covenanted that the lessee should have the *use* of the pump in the yard jointly with himself *whilst the same should remain there*; though it was held that these latter words gave full liberty to the lessor to remove the pump at his pleasure, the Court agreed, that if these words had not been introduced, the lessor could not have taken it away. (e)

But the implied covenant for quiet enjoyment may be qualified, and enlarged or narrowed according to the particular agreement of the parties. Where, therefore, the lessor covenants that he has a good title, or that the lessee shall quietly enjoy, the rules applicable to the implied covenant no longer have effect; but what shall or shall not be a breach will depend upon the particular terms in which the express covenant is framed. (f) In the case, however, of a lease for life rendering rent, it is said, that an express war-

may be enlarged or narrowed by express covenant.

(b) Year Book, 22 Hen. VI. 52. b. and 32 Hen. VI. 32. b. Andrew's case, Cro. Eliz. 214. S. C. 2 Leon. 104. Tisdale v. Essex, Hob. 34. S. C. Moore, 861. And see 2 Browl. 161. Iggulden v. May, 9 Ves. 330. Bac. Abr. *Covenant* (B).

(c) Line v. Stephenson and another v. Executors of Gutteridge, 5

Bing. 183. N. S.

(d) Pomfret v. Ricroft, 1 Saund. 321. S. C. 1 Ventr. 26, 44. 1 Sid. 429. 2 Keb. 505, 569.

(e) Rhodes v. Bullard, 7 East, 116.

(f) Line v. Stephenson and another, *supra*.

ranty will not take away or qualify the implied warranty: but that the lessee may resort to either at his pleasure. (g)

Whether the implied covenant be restrained or enlarged by an express covenant, is a question which can seldom be attended with difficulty. But where several covenants for title, quiet enjoyment, and the like, are introduced into a deed, some of which are of a general, and some of a special nature, it frequently becomes a question of great doubt and nicety how far the general may be restrained by the special covenants. It will, therefore, be fitting here to advert to some of the leading cases upon this head, premising that it is now a settled rule, that the question is to be solved by reference to the intention of the parties to be collected from the whole instrument. (h)

Where upon an assignment of a lease the lessor covenanted that it then was a good and indefeasible lease; and that the lessee (the plaintiff) should quietly enjoy the premises during the term without *any let or disturbance* of the lessor (the defendant), it was held, that the first sentence was distinct from and unrestrained by the latter, and that upon the entry of a stranger, an action might be well brought upon the covenant, assigning as a breach, that the lease was not good and indefeasible. (i)

A., after granting certain premises in fee to B., and after warranting the same against himself and his heirs, covenanted that, notwithstanding any act by him done to the contrary, he was seised of the premises in fee, *and that he had full power, &c.* to convey the same. He then covenanted for himself, his heirs, executors, and administrators, that B. should quietly enjoy without interruption from himself or any person claiming under him; and, lastly, that he, his heirs and assigns, and all persons *claiming under him*, should make

(g) Shep. Touch. 165.

(i) Gainsford v. Griffith, 1 Saund.

(h) Sicklemore v. Thistleton, 6 M. & S. 9.

58. S. C. 1 Sid. 328. 2 Keb. 76, 213.

further assurance. The tenant, being evicted by a stranger who had title, brought covenant against the executors of the feoffor; and the defendant having demurred to the declaration, and assigned for causes that the warranty was only against the grantor and his heirs, or other persons claiming under him, and that the declaration did not shew any defect of title in the grantor, or any interruption by him, his heirs, or any person claiming through him, the question was fully argued; Lord *Eldon*, C. J., delivered the judgment of the Court of Common Pleas in favour of the defendant. "It has been argued," said his lordship, "that this demurrer cannot be allowed, without laying down this principle, that any special covenant in a deed will restrain all the general covenants. If that consequence would necessarily ensue, I admit that the demurrer is not to be sustained. But I take that to be an inaccurate statement of the case. The question is not whether a special covenant will restrain a general one; but whether the particular covenant on which the action is founded be general or special. And my opinion, upon considering the whole deed, is that it is a special one. What would be the use of any of the other covenants if this were general. It would be of little service to the grantor to insist that the warranty and the covenants for quiet enjoyment and further assurance were specially confined to himself and his heirs, if the grantee were at liberty to say, 'I cannot sue you on these covenants; but I have a cause of action arising upon a general covenant, which supersedes them all.' It appears to me, from the words and context of the deed, that in such case we should be driven to say, that the grantor intended at the same time to give a limited and unlimited warranty. The true meaning, therefore, of the covenant is, that the grantor has power to convey and assure according to the terms used, to which terms he refers by the words *in manner aforesaid*, namely, *for and notwithstanding any thing done by him to the contrary.*" (k)

(k) *Browning v. Wright*, 2 Bos. in this case an estate in fee had & Pul. 13. It is observable, that been conveyed; but many of the

The releasors of an estate covenanted, that *for and notwithstanding any acts by them done to the contrary*, they had a good title to convey certain lands in fee : and also that they, *for and notwithstanding any such matter as aforesaid*, had good right and full power to grant, &c. ; and *likewise* that the releasee should *peaceably and quietly enter, hold, and enjoy* the premises granted, *without the lawful let or disturbance of the releasors or their heirs or assigns, or for or by any other person or persons whatsoever*. The releasee being evicted by a stranger having title, covenant was brought, and the declaration set out only the general covenant for quiet enjoyment, omitting the context. The defendant pleaded *non est factum*. It was objected at the trial before Lord Ellenborough, that the deed produced was different from the deed declared on. The whole deed was to be taken together; and *on the whole* it appeared to be only the intention of the parties that the covenant for quiet enjoyment should extend to the act of the covenantor and his heirs, &c. The plaintiff had a verdict:—but his lordship gave the defendant leave to move the Court for a nonsuit. Which being done, the Court discharged the rule ; the Chief Justice delivered the opinion of the Court. “ The covenant *for title* (his lordship observed) and the covenant *for right to convey*, are indeed what is somewhat improperly called synonymous covenants. They are, however, connected covenants generally of the same import and effect, and directed to one and the same object ; and the qualifying language of the one may, therefore, properly enough be considered as virtually transferred to and included in the other of them. But the covenant for quiet enjoyment is of a materially

observations in the judgment are applicable to leases ; and the case has always been considered a leading authority in questions relative to the construction of instruments. The reader is referred to the very elaborate judgment of Lord Eldon, (too long to be here inserted,) in which his lordship fully comments

upon many of the cases upon this head, *viz.* Trenchard *v.* Hoskins, Winch, 93. Johnson *v.* Proctor, Yelv. 175. Fielder *v.* Studley, Ca. temp. Finch, 90. Gainsforth *v.* Griffith, 1 Saund. 58, cited *supra*. Lord Walpole *v.* Lord Cholmondeley, 7 T. R. 148, &c.

different import, and directed to a distinct object. The covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey, *viz.*, in this case an indefeasible estate in fee simple. The covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbances thereupon. For the purpose of this covenant, and the indemnity it affords, it is immaterial in what respects, and by what means, or by whose acts the eviction of the grantee or his heir takes place: if he be lawfully evicted, the grantor by such his covenant stipulates to indemnify him at all events. And it is perfectly consistent with reason and good sense, that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of title which he purports to convey, than for quiet enjoyment. If the covenant containing both the special and general words stood by itself, there would be no pretence for refusing effect to the larger words; and if this could not be done in favour of express words of a narrower import in the same covenant, I cannot possibly understand upon what ground it should be done in favour of implied words of narrower import, which occur in another separate covenant addressed, as has been before said, to a distinct object. It appears to us, therefore, that the covenant for quiet enjoyment is not in point of necessary construction to be restrained in the manner contended for on the part of the defendant; and that it is, therefore, truly stated in substance and effect, when it is stated as it is in the declaration by itself, and without the other covenants, which have been argued to be necessary to be stated on the record along with it, in order to its due construction; and consequently, that there is no ground for a nonsuit in this case, on the supposition of a variance in this respect between the declaration and the instrument declared upon." (l)

(l) *Howell v. Richards*, 11 East, 633

The assignor in a deed of assignment of a lease, after reciting the original lease granted to another *for the term of ten years*, which by mesne assignments had vested in him, and that the plaintiff had contracted for the absolute purchase of the premises, bargained, sold, assigned, transferred, and set over the same to the plaintiff, *for and during all the rest of the said term of ten years*, in as ample a manner as the assignor might have held the same, subject to the payment of rent, and performance of covenants : and then covenanted *that it was a good and subsisting lease, valid in law, in and for the said premises, thereby assigned, and not forfeited or otherwise determined or become void or voidable.* Upon this instrument the Court held that the generality of this covenant for title was not restrained by other covenants, which went only to provide for or against the acts of the assignor himself or those who claimed under him ; such as a covenant against incumbrances except an underlease of part by the assignor for three years, a covenant for quiet enjoyment, and for further assurance ; and, therefore, it appearing that the original lease was for ten years, determinable on a life in being, which dropped before the ten years expired, they held that the assignee might assign a breach upon the absolute covenant for title. (m)

Where, however, the assignor of a term covenanted that he had not at any time done any act whereby the premises assigned could be incumbered ; and *that notwithstanding any such act*, the lease was a good and subsisting lease, and that the defendant, at the time of executing the assignment, had in himself good right to assign the premises *in manner aforesaid*, and according to the intent and meaning of the indenture : it was held, that the covenant that the assignor had good right to assign, was qualified and restrained to his own acts only. (n)

(m) *Barton v. Fitzgerald*, 15 East, 530

(n) *Foord v. Wilson*, 8 Taunton, 543.

But where by a deed of assignment B. covenanted for himself, his heirs, executors, and administrators, that *for and notwithstanding any act done by him*, (B.), it should be lawful for A., to receive the money, debts, and premises thereby assigned, without any let, suit, interruption, or denial of B., his *executors, or administrators*, or any person claiming under him or them: it was held, that the words, "for and notwithstanding any act done by B.," being inconsistent with the subsequent part of the covenant, ought to be rejected, and, therefore, that it was a sufficient breach of that covenant, to allege a receipt of the money *by the executor of B.*, in respect of the premises assigned by the indenture. (o)

A lease for years contained a covenant that the lease was a good lease notwithstanding any act of the lessor; which was followed by a covenant for quiet enjoyment during the term, "without the lawful let, suit, interruption, &c., of the lessor, his executors, administrators, or assigns, or any of them, or any other person or persons whomsoever, having or claiming any estate or right in the premises, and that free and clear, and freely and clearly discharged or otherwise, by the lessor, his heirs, executors, or administrators, defended, kept harmless, and indemnified from all former gifts, grants, bargains, sales, leases, mortgages, assignments, &c., made by the lessor:" it was held that the covenant for quiet enjoyment extended only to protect the lessee against the acts of the lessor, and those claiming under him, and not against the acts of all the world. (p)

Where the lessor covenanted that the lessee should hold the premises without any interruption or eviction by him, or by or through his acts, means, right, &c., he himself holding, under a lease for a longer term, which contained a clause of re-entry by the original lessor, in case the premises should be used for a shop; and the under-lessee not

(o) *Belcher v. Sikes*, 8 B. & C. 185.

(p) *Per* three Justices, diss. Park, *Nind v. Marshall*, 1 B. & B. 319.

being informed of this clause, underlet to a tenant, who incurred a forfeiture by using the premises for a shop; whereupon the original lessor evicted him: it was held that this was not an eviction by means of the covenantor. (q)

To the acts of
what persons a
general cove-
nant for quiet
enjoyment
extends;
not to wrong-
ful evictions;

A *general* covenant for quiet enjoyment, does not extend to wrongful evictions or disturbances by a stranger.

Therefore, according to one of the earliest cases upon this subject, where a man made a lease for years by indenture, and covenanted to warrant the demised premises during the term of the lessee; and the lessee, being afterwards ousted by one who had no title, brought a writ of covenant against the lessor; *Englefield, J.*, said, "The lessee shall not have a writ of covenant against his lessor where he is ousted by wrong: for he may have trespass or *ejectione firmæ* against him who ousted him; but if he were ousted by one who had title paramount against him, as in that case he cannot have any remedy against the person ousting him, he may have a writ of covenant against the lessor by force of the warranty: *quod fuit concessum per plusors.*" (r)

A case, indeed, occurs in *Dyer*, which contradicts the general rule here laid down. There the lessor made a lease, not under seal, for years, and undertook that the lessee should have and enjoy, &c., *without eviction and interruption of any person, &c.*; and upon a stranger entering upon the lessee, he brought an action on the case upon this undertaking of the lessor, which the Court held was maintainable; because the undertaking was express, that the plaintiff should not be molested in his possession. (s)

But in a subsequent case, where the law upon this point was very fully considered, and the decisions very accurately

(q) *Spencer v. Marriott*, 1 B. & C. 457.

(r) Year Book, 26 Hen. VIII. 3. b.

(s) *Mountford v. Catesby*, *Dyer*, 328. a. S. C. 3 Leon. 44. And see the case *Anon. T. 4 Jac.* cited in marg. *Dyer, supra.*

investigated, it was agreed that this case had been overruled. It was admitted that the action being upon a parol agreement, could make no difference in principle; and the rule was then laid down, "that the law shall never judge that a man covenants against the wrongful acts of strangers, unless the covenant be full and express to that purpose. (*t*)

Accordingly, in a modern case, where a conveyance had been made of lands in *New York*, during the *American* war, and the grantor had covenanted that he had a legal title, and that the grantee might peaceably enjoy, &c., without the let, interruption, &c., of the grantor and his heirs, *or any other person whomsoever*; and the States of *America* having seized the lands as forfeited for an act done prior to the conveyance, an action of covenant was thereupon brought: the Court of King's Bench thought it clear that the action would not lie; for they said, "even a general warranty, conceived in terms more general than the present covenant, had been restrained to lawful interruptions." (*u*)

A. leased lands to B. by indenture for years, and covenanted that B. should enjoy the lands peaceably and quietly according to the intent of the indenture, without any *lawful* let, disturbance, ejectment, molestation of the said A. A. afterwards entered upon B. without any lawful title; but as a mere trespasser; and it was held that he had been guilty of no breach of the covenant. (*v*) But in a later case, where it was covenanted by the lessor that the lessee should have, hold, possess, and enjoy the premises without the *lawful* let, hindrance, or disturbance of the *lessor*, or any other person lawfully claiming by, from, or under him; it was said by Sir

except by the
lessor himself.

(*t*) *Hayes v. Bickerstaff*, Vaugh. 118. See also *Anon. M.* 26, and 27 *Eliz.* cited *Dyer*, 328. *a. in marg.* *Tisdale v. Essex*, Hob. 34. *S. C.* Moore, 861. *Chantflower v. Priestley*, Cro. *Eliz.* 914. *Broking v. Cham. Cro. Jac.* 425. *Hammond v. Dod*, Cro. *Car.* 5. *Nokes's case*,

4 *Rep.* 80. *b.* *Jerritt v. Weare*, 3 *Price*, 575.

(*u*) *Dudley v. Folliott*, 3 *T. R.* 584. And see *Noble v. King*, 1 *H. Bl.* 34.

(*v*) *Davie v. Sacheverell*, 1 *Roll. Abr.* 429. l. 45.

George *Jefferies*, C. J., that they would not consider the word "lawful," nor drive the plaintiff to action of trespass, when, by the general implied covenant in law, he had engaged no way to avoid his own deed, either by a rightful or a tortious entry. (w)

And in a modern decision this last case was recognized and allowed; and the Court held that though such a covenant against the lawful entry of the lessor would not be broken by an accidental trespass, yet if he entered under claim of title, he would be liable for a breach of his covenant. (x)

To the acts of what persons a special covenant for quiet enjoyment shall extend.

A special covenant against interruption by J. S. extends to *unlawful* as well as lawful entries by J. S. (y)

Where the condition of a bond, after reciting the purchase from W. by the plaintiffs of certain lands, was to save them and the lands harmless from all manner of mortgages, judgments, extents, executions, and other incumbrances, had and obtained, or thereafter to be had and obtained, by T. T., or any other person; it was held to bind the obligor against the wrongful entry of T. T., being a special covenant against the acts of a particular person. (x)

Where it is against persons claiming title generally.

And, in the following cases also, the covenant for quiet enjoyment has been held to be express against all persons. Where tenant in tail, with reversion in the crown, made a lease for twenty-one years, and covenanted that the lessee should enjoy it against all persons, *except the crown*, and its successors; and the crown granted the reversion by patent to W., who, upon the death of tenant in tail without issue, entered upon the lessee, who brought covenant against the

(w) *Crosse v. Young*, 2 Show, 425.

And see *Holder v. Taylor*, Hob. 12.

(x) *Lloyd v. Tomkies*, 1 T. R. 671.

(y) *Foster v. Mapes*, 1 Leon, 324.

S. C. Cro. Eliz. 212. *Perry v. Edwards*, 1 Str. 400. *Fowle v. Welsh*, 1 B. & C. 29.

(z) *Nash and another v. Palmer*,

5 M. & S. 374.

executors, it was adjudged that the action lay; for none were excepted but the crown and its successors. (a)

So where a bond was made, conditioned that the obligee should enjoy without interruption by any person having, or *claiming*, or *pretending to have*, any right of common: it was held that the bond was forfeited by the entry of a stranger *claiming* a right, and that it was not necessary to shew that such right actually existed. (b)

A fine was levied of a feme covert's estate, declaring the uses to the husband for life, with power to make leases, remainder over, with *joint power* of revocation to the husband and wife. They afterwards jointly revoked the former uses, and declared new uses to the wife for life, remainder over to A. The husband made a lease, and covenanted therein that the lessee should enjoy the premises without let, suit, or interruption, &c., of or by him, his heirs, or assigns, or *any person or persons claiming by, from, or under him*. The lessee having been evicted by A., upon his succeeding to the estate, brought an action of covenant against the executors of the husband; who pleaded that A. *did not claim the premises by, from, or under the husband*. Upon a special verdict found, the Court of King's Bench were of opinion, that as the husband was a necessary party to the second declaration of uses, by which the estate was limited to A., A. must certainly claim under him within the meaning of the covenant. The husband had covenanted against his own acts, and the new limitations were created by one of his acts. (c)

Where against persons claiming title through the lessor.

So where A. being seised in fee simple of an estate, by lease and release executed upon his marriage, settled the same upon himself for life, remainder to his first and other sons in tail, with a power to the tenant for life to grant leases for years, determinable on three lives; and A. afterwards

(a) *Woodroff v. Greenwood*, Cro. Rep. 230. S. C. 10 Mod. 384. Eliz. 517.

(c) *Hurd v. Fletcher*, Dougl. 43.

(b) *Southgate v. Chaplin*, Com.

granted a lease of part of the estate in question for the lives of three persons therein named, and the life of the survivor; in which lease there was a covenant that the lessee should quietly enjoy the premises for and during the said term, without the interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right, or interest, by and from him or any of his ancestors: and the lease not being conformable to the power, and void on the death of A., his eldest son brought an ejectment and evicted the lessee, two of the *cestuy qui vies* being then living: it was held, that the eldest son was a person claiming under the lessor within the meaning of the covenant for quiet enjoyment. (*d*)

What acts
amount to a
breach.

In order to make a breach of the covenant for quiet enjoyment, it is not necessary that the lessee should be disturbed or ousted. The covenant means to ensure to the lessee a legal entry and enjoyment; and therefore, if a prior lease have been granted by the lessor, it is a breach of the covenant, although no actual disturbance may have arisen to the lessee. (*e*)

If the lessor covenant that the lessee *paying his rent* shall quietly enjoy, the payment of the rent will not be a condition precedent to the performance of the covenant; but the lessee being disturbed, may maintain his action, although at the time when the cause of action accrued, the rent was in arrear beyond the period at which a right of re-entry had accrued to the landlord. (*f*)

But such a covenant is so far conditional, that if a lessee grant an underlease with such a covenant, to commence at a future period, and is evicted by the anterior landlord, for forfeiture prior to that period, the under-lessee cannot maintain his action until the commencement of the period. (*g*)

(*d*) *Evans v. Vaughan*, 4 B. & C. 261.

(*e*) *Ludwell v. Newman*, 6 T. R. 458. *Platt on Covenants*, 317.

(*f*) *Dawson v. Dyer*, 5 B. & Ad. 584.

(*g*) *Ireland v. Bircham*, 2 Bing. 90. N. S.

Where a man covenants that A. shall quietly enjoy a certain close, and afterwards sets up a gate across a lane leading to the close, by which A. is obstructed in passing to it, this is a breach of the covenant. (*h*)

Where the lessor covenants that the lessee shall quietly enjoy the lands discharged of all rents, the lessee ought to be discharged from a quit rent. (*i*)

But where the covenant was that A. had not done, *nor permitted, nor suffered to be done*, any act whereby an estate was encumbered: and A. had assented to an act, over which he had no controul; it was held that the meaning of the covenant was that A. had not concurred in any act over which he had a controul, and that it extended to such permissive acts only as have, *through his permission* an operative effect in charging the estate. (*k*)

II. In addition to the express covenants for quiet enjoyment, the lessor frequently covenants to make such further assurance as the lessee's counsel shall advise. This covenant runs with the land. (*l*)

2. Covenant for further assurance.

III. The landlord sometimes covenants that he will repair the premises. But unless he bind himself by such express covenant, the tenant cannot compel him to repair. Therefore if a lease be made of a house, with the use of a pump standing upon the lessor's premises, the lessee has no remedy against the lessor for suffering the pump to be out of repair. (*m*) And where the premises have been consumed by fire, and the landlord, having insured them, has recovered the insurance money, the tenant cannot compel him either at law, (*n*) or in equity, (*o*) to expend the money so

3. Covenant to repair.

(*h*) *Andrews v. Paradise*, 8 Mod. 318.

(*i*) *Hammond v. Hill*, Com. Rep. 180.

(*k*) *Hobson v. Middleton*, 6 B. & C. 295.

(*l*) *Middlemore v. Goodale*, Cro. Car. 503.

(*m*) *Pomfret v. Rictoft*, 1 Saund. 320. S. C. 1 Ventr. 26. 44. 1 Sid.

429. 2 Keb. 505, 569.

(*n*) *Pindar v. Ainsley*, cited 1 T. R. 312.

(*o*) *Leeds v. Cheetham*, 1 Simons 146. *Holtzappel v. Baker*, 18 Ves. 115.

recovered in rebuilding the premises; nor will a Court of Equity restrain the landlord from suing for the rent, until the tenant shall have rebuilt the premises. (p) If a lessor expressly covenant with his lessee, that he will, in case the premises shall be burned down, “rebuild and replace the same in the same state as they were in *before the fire*, he is only bound to restore the premises to the state in which they were *before he let them*, and not to rebuild additions made by his tenant. (q)

4. Covenant
to renew.

IV. Another covenant frequently inserted in the lease on the part of the lessor is, that he will renew the lease to the lessee at its expiration. A covenant for continued renewals, as it tends to create a perpetuity, is not favoured by the Courts: but where it is express and unequivocal, it will be duly enforced; whether it shall be satisfied by the lessors once renewing, or whether it shall amount to an engagement for a perpetual renewal, must depend on the words of the covenant. (r)

Where the covenant was to grant such further lease as the lessee should desire under the same rents and covenants only as in the new lease; (s) and where the covenant was to execute *one or more leases*, under the same terms as the original lease, and *so to continue the renewing* of such lease or leases to the lessee or his assigns, it was held the covenants were for perpetual renewal. (t) In one case, the Court of King's Bench went so far as to hold that the circumstance of the lessor's having frequently renewed a lease, gave a construction to an equivocal covenant for a perpetual renewal, and bound him continually to renew. (u) But this decision has been generally condemned and appears now exploded. (v) In a late case, where a lease for twenty-one years contained a covenant by the lessor, at the expiration of eighteen

(p) *Ibid.*

(q) *Loader v. Kemp*, per Best, C. J. 2 C. & P. 375.

(r) See Bac. Ab. Vol. 4. p. 229.

(s) *Bridges v. Hitchcock*, 1 Brown's P. C. 522.

(t) *Furnival v. Crew*, 3 Atk. 83.

(u) *Cook v. Booth*, Cowp. 819.

(v) *Vide Baynham v. Guy's Hospital*, 3 Ves. 295. *Moore v. Foley*, 6 Ves. 232, *et vide* Platt on Covenants, 242.

years, to grant a new lease "with all covenants, grants, and articles contained in the original lease;" the Court of King's Bench held that this covenant was satisfied by the tender of a new lease containing all the former covenants, *except the covenant for future renewal*. And the judgment was affirmed in the Court of Exchequer Chamber upon writ of error. (w)

Where the lessor in a lease for sixty-one years covenanted that at any time within one year after the expiration of *twenty years* of the said term, upon the request of the lessee, he would execute another lease of the premises for the further term of twenty years, to commence from the expiration of the said term of sixty-one years, and so in like manner at the end of every twenty years during the term of sixty-one years would execute a further term of twenty years, to commence from the expiration of the term last granted; the Court held that the lessee could not claim a further term of twenty years, at the expiration of the last twenty years in the lease, having omitted to claim a further term at the end of the first and second twenty years in the lease. (x)

In a recent case, it was decided, on appeal to the House of Lords, that a covenant, from time to time, to renew and perfect such other further assurance, as the lessee, his executors, administrators, or assigns, with their counsel, learned in the law, should devise, advise, or require, for the better strengthening, confirming, and assuring, of all, and singular, the said demised and granted premises, unto the said lessee, his executors, administrators, and assigns, at such rents, and under such covenants and conditions as were contained in the said indenture of lease, at the charge of the lessee his executors, administrators, or assigns, was to be construed as

(w) *Iggulden v. May*, 7 East, 237. Burnel, Hargr. Jur. Arg. 411.
2 New Rep. 449. And see also 9 (x) *Rubery v. Jervoise*, 1 T. R.
Ves. 325, and *Lord Inchiquin v.* 229.

a covenant for further assurance, and not for perpetual renewal. (y)

A covenant for renewal is a covenant running with the land. (z)

5. Covenant to pay taxes.

V. The landlord is chargeable with the land-tax in respect of the rent; this the tenant is required and authorized in the first instance to pay, and then deduct it out of the rent; (a) but the landlord will be only chargeable in proportion to the *quantum* of rent he receives, and not according to the improved value. Therefore, where the landlord covenanted in the lease to pay the land-tax, *and save the tenant harmless*, and the premises were taxed at the rate of 150*l.* *per annum*, the landlord receiving only 120*l.* *per annum*, the Court held that the covenant was satisfied by the payment of the tax at the rate of 120*l.* (b)

And where the lessor expressly covenanted to pay all taxes charged or *to be charged* upon or in respect of the demised piece of ground during the continuance of the term, and at the time when the lease was executed, the lessor gave a licence to the lessee to build on the land demised, and the lessee did build, and thereby increased the annual value of the premises; it was held that the landlord was liable, upon his covenant to pay the taxes, only in proportion to the rent reserved, and not to the improved value. (c)

(y) *Brown v. Tighe*, 8 Bli. 272. N. S. 2 Cl. & Fin. 396.

(z) *Isted v. Stoneley*, 1 And. 82. *Anon. Moore*, 159. *Roe dem. Bamford v. Hayley*, 12 East, 469. See further as to the cases in which equity will grant a specific performance of a covenant to renew, and as to tenant-right of renewal, *post*, Book IV.

(a) 38 Geo. III. c. 5, s. 17. The

decisions on this section are commented upon *infra*.

(b) *Yaw v. Leman*, 1 Wils. 21. And see *Hyde v. Hill*, 3 T. R. 377. *Whitfield v. Brandwood*, 2 Stark. 440, and *Watson v. Atkins*, 3 B. & A. 647.

(c) *Watson v. Horne*, 7 B. & C. 285, and see *Rex v. Scott*, 3 T. R. 602.

But in the same case, it was also held that the tenant having compounded for his taxes, under the provisions of a local act, and in consequence of such composition his premises being assessed at a less annual sum than the improved annual value; still that the tenant paid taxes in respect of the whole improved annual value, and that the landlord was to pay such proportion of the taxes as the rent bore to the full improved annual value. (*d*)

A covenant by the lessor to pay all *taxes* on the lands demised does not make him liable to the rates of the church and poor. (*e*)

SECTION II.

OF THE COVENANTS ON THE PART OF THE LESSEE.

I. By the very relation of landlord and tenant the law imposes an obligation on the lessee to treat the premises demised in such a manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the wilful or negligent conduct of the lessee. He is, therefore bound to keep the soil in a proper state of cultivation; to preserve the timber; and to support and repair the buildings. These duties fall upon him without any express covenant on his part; and a breach of them will, in general, render him liable to be punished for waste. (*f*)

The tenant is bound to cultivate and repair the premises.

Waste is either voluntary, or permissive: the one an offence of commission; the other of *omission*. It may be incurred in respect of, 1. the soil; 2. the buildings; 3. the trees, fences, &c. ; 4. the live stock on the premises. (*g*)

(*d*) *Watson v. Horne*, 7 B. & C. 285, and see *Rex v. Scott*, *supra*.

(*e*) *Theed v. Starkey*, 8 Mod. 314. *Rowls v. Gells*, Cowp. 453.

(*f*) Co. Lit. 53. *a*. And if a stranger enter and commit waste,

the tenant will be liable to an action of waste by his landlord, and will be left to his remedy by action of trespass against the stranger, 2 Rol. Abr. 821. l. 5.

(*g*) Co. Lit. 53. *a. b*.

Waste.

To the soil.

1. To dig and carry away the soil; to dig clay; to *open* mines, gravel pits, and the like, is voluntary waste. (*h*) As is also to change the face of the soil, by converting arable land into pasture, or pasture into arable; turning garden ground into tillage; sowing grain in hop-grounds; (*i*) ploughing up strawberry beds; (*k*) building a house upon the land; (*l*) and in short, in any manner essentially varying the quality of the soil, or the nature of its produce. But the offence consists in the first penetrating and opening the soil; therefore it is not waste to dig in mines or pits already open. (*m*) And if mines, &c., be expressly named in the demise, so as to shew an intention in the parties that the lessee shall have the benefit of their produce, it will not be waste in him to open them. (*n*) Where clay, marle, &c., is taken from the soil for the purpose of repairing the buildings, or improving the land, this will not be waste. (*o*) Nor is it waste to dig trenches for draining off the water. (*p*) If the tenant suffer the land to be surrounded or overflowed with water, through his negligence in permitting the embankments, &c., to fall into decay, he will be chargeable for permissive waste to the soil; but if the overflow be caused by tempest, he will not be answerable for such accident, unless he omit to repair the damage. (*q*)

To the buildings;

2. Voluntary waste to buildings is the deliberately pulling

(*h*) Co. Lit. 53. 3. Nowell v. Donning, 2 Rol. Abr. 816. l. 15. Saunder's case, 5 Rep. 12. Manwood's case, Moore, 101. Moyle v. Moyle, Owen, 67. Astry v. Ballard, 2 Mod. 193.

(*i*) *Ibid.* Tresham v. Lamme, 2 Rol. Abr. 814. l. 50. Harrow School v. Alderton, 2 Bos. & Pul. 86.

(*k*) Watherell v. Howells, 1 Camp. 227.

(*l*) Co. Lit. 53. *a. contr.* Keilw. 38. *b.* Lord Darcy v. Askwith, Hob. 238. Cecil v. Caves, 2 Rol.

Abr. 815. l. 45.

(*m*) Co. Lit. 53. *b.* Saunders's case, 5 Rep. 12.

(*n*) *Ibid.* In Lord Rutland v. Gie, 1 Sid. 152. S. C. 1 Lev. 107, it is made a query whether a parson may dig mines in his glebe.

(*o*) Co. Lit. 53. *b.* Moyle v. Moyle, Owen, 67. Roll Abr. 816.

(*p*) Altham's case, 2 Rol. Abr. 820. l. 23.

(*q*) Co. Lit. 53. *b.* 2 Rol. Abr. 816. l. 32, &c. Anon. Moore, 62. Griffith's case, *ibid.* 69. Anon. *ibid.* 73.

of them down; unroofing them; (r) altering one kind of building into another, as a corn-mill into a fulling-mill, or a hall into a stable; (s) throwing two rooms into one; (t) pulling down the house and rebuilding it upon a greater or less scale than before. (u)

According to the law, in its ancient strictness, it was waste in the tenant to take down any doors, windows, wainscots, or other thing affixed to the freehold, even though he himself might have originally put them up. (v)

This rule has been much relaxed in favour of the tenant, as between whom and his landlord the privilege of removing fixtures is construed more liberally than between the executor of tenant for life and remainder-man; and still more than as between the heir, or devisee, and executor, which is the most favourable case for the real estate. (w)

The exceptions to the rule have been taken most strongly in favour of trade.

Things affixed by the tenant to the freehold, for the purpose of *trade or manufacture*, may be removed by him whenever the removal is not contrary to any prevailing practice; and where the article can be removed without causing material injury to the estate, and where the articles in themselves were of a perfect chattel nature before they were put up, or at least have, in substance, that character independently of their union with the soil; or in other words, when they may be removed without being entirely demolished, or losing their essential character or value. (x)

Fixtures.

Buildings which do not come strictly within the description

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| (r) Co. Lit. 53. a. | Doe dem. Grubb v. Earl of Burlington, 5 Bac. & Ad. 511. |
| (s) <i>Ibid.</i> 2 Rol. Abr. 814. l. 46, 915. l. 41. Greene v. Cole, 2 Sannd. 252. S. C. 1 Lev. 309. | (v) Co. Lit. 53. a. |
| (t) 2 Rol. Abr. 815. l. 37. | (w) 3 East, 38. |
| (u) <i>Ibid.</i> 815. l. 33, 35, <i>et vide</i> | (x) Amos & Ferard on Fixtures, 115, <i>et vide</i> 2 Atk. 16. |

of buildings erected for the purpose of trade, yet if connected with such purposes, have been held to fall within the exception; such as a cyder mill, (*y*) fire-engines and steam-engines in collieries; (*x*) a shed called a Dutch barn formed of uprights, resting on a foundation of brick; (*a*) a varnish house built on plates laid on brick-work; (*b*) salt pans considered with reference to trade. (*c*)

The tenant may also remove a baker's oven, (*d*) or dyer's or soap boilers' vats, (*e*) furnaces, (*f*) coppers in brewhouses, &c.; (*g*) greenhouses and hothouses in a gardener's grounds, and trees planted for sale by nursery men; (*h*) wind-mills made of wood, having a foundation of brick, the wood work not inserted into the brick foundation, but resting on by their weight only. (*i*)

But it remains to be decided, whether he may remove substantial or permanent additions to the premises, although built for the purposes of trade, as lime, pottery, or brick kilns, (*k*) wind or water-mills, not being of the description before mentioned, work-shops, store-houses, furnaces and flues of smelting and glass houses, stoves and floors of smelting-houses, and erections of a like nature. (*l*)

Although tenant cannot remove articles, which are articles of an agricultural nature, yet if the object and purport of the erections have relations to trade of any description, the tenant may remove them, as in the mixed cases before mentioned, of cyder mills, machinery for working mills, and collieries; and salt pans; and on the same principle, although private

(*y*) *Lawton v. Lawton*, 3 Atk. 14.

(*z*) *Lawton v. Lawton*, *supra*.
Dudley v. Ward, Amb. 114.

(*a*) *Dean v. Allally*, 3 Esp. 11.

(*b*) *Penton v. Robart*, 2 East, 88.

(*c*) *Lawton v. Salmon*, 1 H. Bl. 259, and see 3 East, 54.

(*d*) Year Book, 20 Hen. VII. 136.

(*e*) *Ibid.*

(*f*) *Poole's case*, 1 Salk. 368.

(*g*) 3 Atk. 14.

(*h*) *Penton v. Robart*, *supra*.

(*i*) *Rex v. Ottley*, 1 B. & Ad. 161. *Rex v. Londonthorpe*, 6 T. R. 377.

(*k*) *Thresher v. East London Water Works*, 2 B. & C. 608.

(*l*) See *Amos & Ferard on Fixtures*, 276.

persons cannot sell or remove fruit trees planted by themselves, yet nursery men may remove trees and shrubs which they have planted for the purpose of sale; but they cannot plough up strawberry beds out of the ordinary course of management of the nursery ground; nor, as it should seem, take down hot-houses, green-houses, forcing-houses, or erections of that description. (*m*)

Fixtures put up for ornament or convenience, and not permanently affixed to the freehold, may be removed by the party putting them up; but the privilege is of a more limited nature than that in favour of trade.

It was lately decided that a pump, very slightly affixed to the freehold, was removable as a tenant's fixture. (*n*) Looking glasses standing on chimney pieces, and nailed to the wall, and book-cases standing on, but not fastened to brackets and screwed to the wall, have been held to fall within the description of fixed furniture. (*o*) Hangings, (*p*) tapestry, pier glasses, (*q*) whether nailed to the walls or panels, or put up in lieu of panels, marble and other ornamental chimney pieces, (*r*) marble slabs, window-blinds, wainscot fixed to the walls by screws, (*s*) grates, ranges, and stoves, although fixed in brick-work; iron backs to chimneys, beds fastened to the walls or ceilings, fixed tables, furnaces and coppers, mash tubs and fixed water tubs, coffee and malt mills, cupboards fixed with holdfasts, clock cases, iron stoves, and the like, may be removed. (*t*) But fixtures can be removed only when the separation occasions little or no damage, which is a question for a jury on the issue, whether the fixtures are removable or not by law. (*u*)

(*m*) See Amos & Ferard on Fixtures, 279.

(*n*) Grymes v. Boweren, 6 Bing. 437. 4 Moore & P. 143.

(*o*) Birch v. Dawson, 4 Nev. & Man. 22. 2 Ad. & Ell. 37. 6 C. & P. 658.

(*p*) Beck v. Rebow, 1 P. Wm. 94.

(*q*) *Ibid.*

(*r*) *Ex parte* Quincey, 1 Atk. 477.

(*s*) *Ibid.*

(*t*) Amos & Ferard on Fixtures, 276.

(*u*) Avery v. Cheslyn, 5 Nev. & M. 373.

A tenant cannot remove a border of box planted by him. (v)

The rights of parties respecting particular articles, will be much regulated by custom; and, therefore, where it has been a custom to value a particular article between outgoing and incoming tenants, it is a proper criterion for determining the nature of the property, and whether it is a fixture or not. (w)

If a lessee assigns a house by way of mortgage, but without mentioning fixtures, trover cannot be maintained for them by subsequent assignees, as trustees for sale, or the like. (x)

According to the uniform consent of the cases, whatever things the tenant has a right to remove ought to be removed within the term; for if the tenant leave the premises without removing them, they then become the property of the reversioner. (y) But where the tenant holds over, even so as to become a trespasser, he will not be considered as having abandoned the things he had a right to remove: and therefore, where a tenant had let off part of the land demised to A., who erected a building for the purpose of making varnish, (which had a brick foundation with a chimney let into the ground, and in which A. carried on his trade,) and the tenant's term expiring, the landlord recovered a judgment in ejectment for the premises against A., who thereupon pulled down the building and carried away the materials; the Court of King's Bench were of opinion that, though he was a trespasser in respect of the land, he was not a trespasser *de bonis asportatis*; for, being still in possession of the premises, there was no pretence to say he had abandoned his right to the goods. (z)

(v) *Empson v. Soden*, 4 B. & Ad. 655.

(w) *Davis v. Jones*, 2 B & A. 166. And see *Wetherell v. Hewell*, 1 Camp. 227.

(x) *Longstaff v. Meagoe*, 4 Nev. & M. 211. 2 Ad. & Ell. 167.

(y) *Poole's case*, 1 Salk. 368. *Ex parte Quincy*, 1 Atk. 477. *Fitzherbert v. Shaw*, 1 H. Bl. 258. *Lyde v. Russell*, 1 B. & Ad. 394. (z) *Penton v. Robart*, 2 East, 85. S. C. 4 Esp. 33. And *Davis v. Jones*, *supra*.

Where, however, a purchaser of lands had brought an ejectment against the tenant from year to year, and the parties had entered into an agreement that judgment should be entered for the plaintiff, with a stay of execution till a given period; though in such agreement no mention was made of any buildings or fixtures, it was held that the tenant could not in the mean time remove buildings or fixtures, *viz.*, a wooden stable standing upon rollers, and posts and rails, from the premises, which he had himself erected before action brought; because the fair interpretation of such agreement was, that the defendant should in the mean time do no act to alter the premises, but should deliver them up in the same condition as when the agreement was made and the judgment signed. For though he would clearly have been entitled to take away the articles, if he had done it during the continuance of his term, yet by the agreement the parties had made a new contract, which put an end to the term. (a)

Permissive waste to buildings consists in omitting to keep them in tenantable repair; suffering the timbers to become rotten, by neglecting to cover in the house; or the walls to fall into decay for want of plaistering; (b) or the foundation to be sapped by leaving a mote or ditch unscoured. (c) Merely suffering the house to remain unroofed (provided it were so at the commencement of the tenancy) will not be waste; but then the tenant must take the consequences of any other part thereby becoming ruinous or decayed. (d) To permit walls, built to exclude the water, to remain in such a dilapidated state as to cause the lands to be overflowed and injured, is waste. (e)

Permissive waste.

(a) *Fitzherbert v. Shaw, supra.*

(b) Co. Lit. 53. a. 2 Rol. Abr. 815. l. 31. *Weymouth v. Gilbert*, *ibid.* 816. l. 42. *Newell v. Downing, ibid.* l. 48. *Corbet v. Stonehouse, ibid.*

(c) *Sticklehorne v. Hatchman, Owen*, 43.

(d) 2 Rol. Abr. 818. l. 17.

(e) Co. Lit. 53. b. *Anon. Moore*, 62. *Griffith's case, Moore*, 69.

If the house be destroyed by lightning, tempest, or the king's enemies, it is not waste; though to suffer it to remain ruined will be so; (*f*) or if the damage done by the tempest were owing to the tenant's previous neglect to repair the premises. (*g*) Formerly persons in whose houses accidental fires commenced were liable for waste; (*h*) but the statute 6 Anne, c. 31, s. 6, has now altered the law; with a proviso, however, that no agreement between landlord and tenant shall be thereby defeated. (*i*)

Waste as to
trees, &c.

3. To cut down timber, or to lop it so as to occasion its decay, is waste. (*k*)

Trees must be above twenty years old to be timber. (*l*) Oak, elm, and ash, of that age, are considered as timber throughout the kingdom; (*ll*) and in counties where these trees are scarce, others are by local custom accounted timber. Thus, it appears from the cases, that in *Buckinghamshire*, beech, cherry, and aspen are timber; (*m*) and that beech is also timber in *Gloucestershire* (*n*) and *Bedfordshire*; (*o*) beech and willow in *Hants*: (*p*) birch in *Yorkshire* and *Cumberland*; (*q*) and these together with holly, (*r*) black-thorn, (*s*) horse-chestnut, lime, yew, walnut, crab, and horn-beam, in different parts of the country. (*t*) And though pollards, or such timber-trees as have been lopped, are not

(*f*) Co. Lit. 53. *a*.

(*g*) Anon. Moore, 62.

(*h*) Co. Lit. 53. *b*.

(*i*) *Vide infra*, 245.

(*k*) Co. Lit. 53. *a*.

(*l*) 2 Inst. 643. *et vide*. Aubrey v. Fisher, 10 East 451.

(*ll*) *Ibid*. Samuel v. Johnson, Dyer, 65. *a*. It was said in Turnor v. Smith, Gwil. 529, that ash was not timber in Essex: query?

(*m*) Anon. 2 Rol. Rep. 814. Aubrey v. Fisher, *supra*. Wright v. Powle, Gwil. Tithe Ca. 357. Bibye v. Huxley, Bunb. 192.

(*n*) Rex v. Minchin Hampton,

Burr. 1308. Abbott v. Hicks, 1 Wood's Tithe Ca. 319. Walbank v. Hayward, 3 Wood, 512.

(*o*) Downes v. Moorman, 2 Wood, 238. S. C. Gwil. 658.

(*p*) Layfield v. Cowper, 1 Wood, 330. Guffley v. Pindar, Hob. 219.

(*q*) Countess of Cumberland's case, Moore, 812.

(*r*) Pinder v. Spencer, Noy, 30.

(*s*) Cook v. Cook, Cro. Car. 531.

(*t*) Holliday v. Lee, Moore, 541. Duke of Chandos v. Talbot, 2 P. Wms. 606. Walton v. Tryon, Gwil. 832.

in general accounted timber, (*u*) yet these also, by local custom, may fall within that denomination. (*v*)

To cut down trees, not being timber, if they be growing in defence of the house, is also waste. (*w*) And if, after cutting down such trees, the tenant cut away or stub up the germins, he will be guilty of double waste. (*x*) And when *fruit* trees are growing in an orchard or garden, it is waste to cut them down. (*y*)

It is not waste if the tenant cut down timber trees for the necessary repairs of the house, fences, &c., (*s*) even though he may have covenanted to repair at his own charge (*a*): but then it must be for the repairing of buildings, &c., existing when he entered, and not for such as he may have erected. (*b*) If the house be accidentally burned, the tenant may cut timber for rebuilding it: (*c*) but he cannot cut timber to build a new house, (*d*) or to put up rails where none were before. (*e*) It must moreover be for repairs which are presently needed, and not for such as are likely to become necessary. (*f*) And it must not be for repairs which have been occasioned by his own negligence: (*g*) for if the tenant suffer the buildings to fall into decay, and then cut down timber to repair them, he will be guilty of double waste. (*h*)

If a bailiff of an estate assign a tree for housebote, pursuant to the lease, and be discharged prior to the tree being felled, the tenant may, nevertheless, take the tree for the intended purpose. (*i*)

(*u*) *Soby v. Molyns*, Plowd. 470. p. 257.

(*v*) *Anon.* Gwil. 165. Duke of Chandos *v.* Talbot, 2 P. Wms. 606. *Mirehouse on Tithes*, 77.

(*w*) Co. Lit. 53. *a*.

(*x*) *Fitz. N. B.* 136.

(*y*) Co. Lit. 53. *b*. 2 Rol. Abr. 817. l. 32.

(*z*) Co. Lit. 53. *b*.

(*a*) *Anon.* Moore, 23, *et vide infra*,

(*b*) Co. Lit. 53. *b*.

(*c*) *Ibid.*

(*d*) *Darcy v. Asquith*, Hob. 238.

(*e*) Co. Lit. 53. *b*.

(*f*) *Gorges v. Stanfield*, Cro.

Eliz. 593.

(*g*) Co. Lit. 53. *b*.

(*h*) *Ibid.* 2 Rol. Abr. 822. l. 38.

(*i*) *Courtenay v. Fisher*, 4 Bing. 3.

The timber must be absolutely and immediately employed in the repairs for which it was felled; for if the tenant cut down timber and sell it, and out of the proceeds repair the house; or if he sell it, and afterwards buy it again, and then use it for repairing; or if he exchange it for other timber, although it be used for the like purpose, (*k*) he will in either case be guilty of waste. (*l*)

Whether trees have been cut down *bond fide* for the purpose of repairing is a question for a jury. (*m*)

For other estovers, as fire-bote, cart-bote, hedge-bote, and the like, the lessee may also cut down timber; (*n*) but he may not cut timber for fire-bote so long as he has enough dead wood for his consumption. (*o*)

The tenant, however, may cut down timber-trees that are dead; (*p*) and such trees as are neither timber, nor grow in defence of the house, the lessee is at liberty to cut. (*q*) But he may not go farther than cutting; for if he grub up the trees, hedges, or underwood, he will then be guilty of waste. (*r*) When thorns, bushes, furze, or the like, are growing in the pasture or arable lands, the tenant may lawfully stub them up: for this is good husbandry and not waste. (*s*)

4. To the live stock.

4. Waste may be done in respect of animals, by taking or destroying so many of them as to unstock the dove-cote, warren, park, or fish-pond in which they were kept; (*t*) and it is waste if the tenant stop the pigeon-holes so that the

(*k*) *Simmons v. Norton*, 7 Bing. 640. 5 M. & P. 645.

(*l*) Co. Lit. 53. b. Com. Dig. Waste D. (5). Roll. Ab. 823. Vin. Ab. Waste D.

(*m*) *Doe dem. Foley v. Wilson*, 11 East, 56.

(*n*) *Ibid.* *Darcy v. Asquith*, Hob. 234.

(*o*) *Fitz. Nat. Brev.* 136.

(*p*) Co. Lit. 53. b.

(*q*) *Ibid.* *Sir John Gage v. Smith*, 2 Rol. Abr. 817. l. 17.

(*r*) Co. Lit. 53. b. Anon. Cro. Jac. 127.

(*s*) *Maleverer v. Spinke*, Dyer, 37. a.

(*t*) Co. Lit. 53. b. *Vavasor's case*, 2 Leon. 222. Anon. 4 Leon. 240.

pigeons cannot build. (u) And it is permissive waste, if the tenant suffer the park-paling to be decayed, so that the deer stray and be lost. (v)

The law not only prohibits voluntary and permissive waste, but also calls upon the tenant to cultivate the lands demised in a husbandlike manner, conformably to the custom of the country; (w) this obligation, however, extends only to reasonable and usual cultivation, and does not bind the tenant to any extraordinary mode of agriculture. (x)

I. Covenant to cultivate the lands. Liability of lessee by mere force of law; or by express covenant, running with the land.

The liability of the lessee upon this point, however, is usually defined by an express covenant; in which case, we must look to the particular terms of the lease to ascertain the extent of the liability, without regard to the general obligation imposed by law in the absence of express covenants.

All covenants by the lessee for cultivation run with the land. (y)

A covenant by the tenant, not to remove or grub up trees, is broken by removing them from one part of the premises to another; and by taking away trees, although the tenant plant a greater quantity than those removed, unless those taken away were dead. (z)

A covenant by the tenant to occupy the premises in a good and husbandlike manner, according to the custom of the country where the premises lie, will be broken by contravening the prevalent course of husbandry in the neighbourhood. (a) And even though the contract be simply to occupy an estate *in a good and husbandlike manner*, this will *prima facie* throw a liability upon the tenant to cultivate the land according to the practice of the neighbourhood. (b)

(u) *Moyle v. Moyle*, Owen, 66.

(v) *Ibid.* Co. Lit. 53. b.

(w) *Powley v. Walker*, 5 T. R. 373.

(x) *Brown v. Crump*, 1 Marsh. 567. S. C. 6 Taunt. 300.

(y) *Shep. Touch.* 161.

(z) *Doe dem. Wetherell v. Bird*, 6 C. & P. 195.

(a) *Lekh v. Hewitt*, 4 East, 154.

(b) *Ibid.* 159.

And though a farm be held under a written agreement, the custom of the neighbourhood may well be insisted upon, provided such custom be not excluded by the terms of the agreement. (c)

If the landlord, in his declaration, aver a particular custom of cultivation, which the tenant in his plea traverses as laid in the declaration, and the jury find that the custom is not as averred in the declaration, but that the farm has not been cultivated according to the custom of the neighbourhood, the landlord will be held to have tied himself up to the particular custom as alleged by him, and having failed to prove it, will not be entitled to recover. (d)

A covenant to manage in the same manner as by other tenants, will be satisfied by cultivation in the mode in which the landlord has permitted his other tenants to cultivate, unless the tenant is acquainted with the terms of a previous lease, in which case he will be bound to cultivate according to the terms in such previous lease. (e)

A covenant by the lessee that he will at all times during the term plough, sow, manure, and cultivate the demised premises, (*except the rabbit-warren and sheep-walk*), not only obliges the lessee to cultivate all the land, except the warren, &c., but restrains him from ploughing the parts excepted; and therefore if he plough them, he is guilty of a breach of covenant. (f)

But a covenant by the lessee that he will sufficiently muck and manure the land with two sufficient sets of muck within the space of six of the last years of the term, the last set of muck to be laid upon the premises within three years of the expiration of the term, is satisfied by the tenant's laying

(c) <i>Wigglesworth v. Dallison</i> , Doug. 201. <i>Senior v. Armitage</i> , Holt's N. P. C. 197. And see <i>Webb</i> <i>v. Plummer</i> , 2 B. & A. 746. <i>Hut-</i> <i>ton v. Warren</i> , 1 Mees. & W. 466.	M. & R. 789. 5 Tyrw. 383.
(d) <i>Angerstein v. Handson</i> , 1 C.,	(e) <i>Liebenrood v. Vines</i> , 1 Meri- vale, 15.
	(f) <i>Duke of St. Albans v. Ellis</i> , 16 East, 352. <i>Vide Brown v.</i> <i>Brown</i> , 1 Lev. 57.

on two sets of muck within the three last years of the term. (g)

A covenant to deliver up all the trees standing in an orchard at the time of the demise, reasonable use and wear only excepted, is not broken by removing trees, decayed and past bearing, from a part of the orchard which was overstocked. (h)

A lease contained a covenant that the lessee would not dig gravel out of any part of the demised premises without the consent of the lessor, or paying him 10s. *per* load, except what should be dug out of two acres, part of the premises demised, and part of a garden late in the possession of A. B. By an indorsement made on the lease before execution, it was agreed that it should be lawful for the lessor to let *any part* of the demised premises for the purpose of making bricks or tiles, he paying the lessee 3*l.* for every acre which he should so let; and further, that it should be lawful for the lessee to break up and dig for gravel in *any part* of the demised premises, he covenanting to pay to the lessor 20*l.* for every acre he should break up, at or before the expiration of the term, and *to make good the same*. It was held that the lessee was not entitled to dig for gravel in the two acres of garden ground mentioned in the lease without making them good. (i)

A covenant by the lessee to pay a certain additional rent for every acre converted to tillage, is recoverable by way of liquidated damages; and the receipt of the original rent, without demanding the additional sum, will not be a waiver. (k)

II. We have seen that the omission of the tenant to up- II. Covenant to repair.

(g) *Pownall v. Moores*, 5 B. & A. 416.

(h) *Doe dem. Jones v. Crouch*, 2 Campb. 449.

(i) *Flint v. Brandon*, 1 N. R. 73.

(k) *Denton v. Richmond*, 3 Tyr. 630; 2 Cr. & M., *et vide* *Jones v. Green*, 3 Y. & J. 298. *Farrant v. Olmius*, 3 B. & A. 692. *Astley v. Weldon*, 2 Bos. & P. 350.

Liability of the
tenant by mere
force of law,

hold the premises demised, will render him liable to be charged for waste: but beyond this liability, the law lays upon the tenant an obligation to repair. (*l*) The extent, however, of this obligation is not very accurately defined. It seems that the natural and unavoidable decay of the buildings must always be allowed for, where there is no express covenant to the contrary: and that the lessee will satisfy the obligation which the law imposes upon him, by delivering up the premises at the expiration of his tenancy in a habitable state. Upon one occasion, where a landlord claimed to recover a compensation from the defendant, who had been his tenant from year to year, for his having neglected to repair the premises, Lord *Kenyon*, C. J., would not admit the claim. "A tenant from year to year," said his lordship, "is bound to commit no waste, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises; but in the present case the plaintiff has claimed a sum for putting a new roof on an old worn-out house: this, I think, the tenant is not bound to do, and that the plaintiff has no right to recover." (*m*)

In an old case it was held, that if a house is let in parts, he who occupies the lower part is bound to repair the foundation, and he who occupies the garret, the roof. But in the case of *Tenant v. Goldwin*, the Court doubted of this case, and said, although in the *Nat. Brev.* there was a writ to that effect, yet it was in that instance founded upon a custom. (*n*)

And where the landlord relying upon no particular agreement, but upon the obligation arising out of the relation of landlord and tenant, declared against his lessee, that in consideration of his having become tenant of a certain mes-

(*l*) *Supra*, p. 214. And see *Parteriche v. Powlet*, 2 Atk. 383, and *Godfrey v. Watson*, 3 Atk. 518.

(*m*) *Ferguson v. —*, 2 Esp. N. P. C. 590, *et vide* *Answorth v.*

Johnson, 5 C. & P. 230. *Leach v. Thomas*, 7 C. & P. 327.

(*n*) *Keilway*, 38. *b.* *Anon.* 11 Mod. 8. *Tenant v. Goldwin*, 6 Mod. 314. *Fitz. Nat. Brev.* 296.

suage, he undertook to keep the same in good and tenantable repair; and to uphold and support, and to deliver up the same to the plaintiff at the expiration of his term in the condition in which he received it;—and then proved that the house was in good repair when the tenant entered it; but that upon quitting it, he had in some degree damaged the ceiling, the walls, and other parts of the house, by removing the shelves and fixtures; *and had not left the house in a good tenantable condition*; so that the plaintiff had been put to a small expense in refitting it for the occupation of a new tenant; *Gibbs, C. J.*, nonsuited the plaintiff, saying, that, though the tenant might be answerable to some extent, he was not liable to the extent stated in the declaration; and that tenant from year to year is not liable for general repairs. And his lordship intimated that tenant at will would not be bound to rebuild in case the premises became ruinous by accident. (o)

In an action of assumpsit by the landlord against the tenant for want of repair, the tenant paid into Court the sum expended by the landlord, in putting the premises into repair. The landlord, by his replication, averred he had sustained damages beyond that sum, and the jury gave him damages for the loss of the use of the premises whilst under repair. (p) On motion to set aside the verdict, and enter a nonsuit, the Court refused to disturb the verdict. (q)

In case the premises were accidentally or negligently consumed by fire, the tenant, would not, at common law, have been guilty of waste if he neglected to rebuild them. By the statute of *Gloucester*, tenants for life and years were made liable for waste without any exception, which rendered them liable for destruction by fire, but tenant at will was still not liable. (r) By the statute 6 Anne, c. 31, ss. 6, 7,

does not attach
in case of fire.

(o) *Horsefall v. Mather*, Holt's N. P. C. 7.

(q) *Ibid.* 1 Bing. 467. N. S.

(r) *Countess of Salop's case*, 5

(p) *Woods v. Pope*, 6 C. & P. 782. Rep. 13. Co. Lit. 57. a. n. 377.

(made perpetual by the statute 10 Anne, c. 14,) it was enacted, "that no action, suit, or process whatsoever, shall be had, maintained, or prosecuted against *any person* in whose house or chamber any fire shall accidentally begin, or any recompence be made by such person for any damage suffered or occasioned thereby; provided that this do not extend to defeat or make void any contract or agreement made between landlord and tenant." This restored the common law, so that at present the tenant cannot by mere force of legal obligation, without some special covenant or agreement, be called upon to rebuild the premises which may be burned down during his occupation. (*s*)

Special covenant to repair

runs with the land,

The liability of the lessee to keep the premises in repair is frequently enlarged, controlled, or at least defined, by an express covenant in the lease. Usually the lessee covenants to maintain, sustain, and repair all the buildings, and to keep the same in repair; and to deliver them up so repaired at the end of the term. Such a covenant runs with the land;—for it affects the estate and reversion in the hands of every person that may have them. (*t*)

If the tenant agree to lay out a certain sum in repairs to the approval of the lessor, with a distinct agreement that the tenant may retain a given sum out of the first rent for such repairs, the lessor's approval is not a condition precedent to the lessee retaining the rent. (*u*)

If one covenant to keep in repair and leave the premises *in the same state as he found them*, he is merely required to use his best endeavours to keep them in the same tenantable repair in which he found them. Natural and unavoidable decay is no breach of the covenant. (*v*) And supposing he covenant to *repair* generally, this does not appear to impose

(*s*) *Et vide* Lord Chesterfield v. Bolton, Com. Rep. 629. Co. Lit. 57, a. (N.) 377.
(*t*) Buckley v. Pirk, 1 Salk. 317.

(*u*) Dallman v. King, 4 Bing. 105. N. S.

(*v*) Shep. Touch. 169.

upon him a liability to uphold the buildings without regard to the necessary decay of old materials. In *Gutteridge v. Munyard*, (*w*) a lessee had covenanted to keep the premises, which were old, in repair; it was held he was not liable for such dilapidations as resulted from the operation of time and the elements.

The question in such cases is, whether the premises have been kept in substantial repair as opposed to claims for fancied injuries; such as a mere crack in a pane of glass, or the like. (*x*) And with a view to the determination of this question, the jury may, it seems, inquire whether the premises were new or old at the time of the demise, and be regulated in their verdict accordingly. (*y*) But although the defendant may shew the state of the premises generally at the commencement of the time, it is not competent to him to go into matters of detail. (*z*)

The covenant to keep in the same state the woods, lands, and natural productions, will not render the covenantee liable for any injury which may arise to these from the act of God. As if trees be blown down, the covenant to leave them in the same state will not be broken; for to keep it has now become an impossibility. (*a*) But the case is different with respect to buildings. For whether these be destroyed by the act of God, by negligence, or design, the covenant will remain binding on the covenantee, and he will be guilty of a breach by failing in the restoration. (*b*)

and binds the tenant to rebuild in case of accident by tempest,

Where therefore the lessee covenants to repair, and the or by fire.

(*w*) 1 Moo. & Rob. 334.

N. S. 451.

(*x*) *Per* Lord C. J. Tindal in *Stanley v. Towgood*, 3 Bing. N. S. *et vide* *Harris v. Jones*, 1 Moo. & Rob. 173.

(*a*) *Shep. Touch.* 173. Year Book, 40 Edw. III. 6. *a*. See also *Ingolsby v. Wivell*, Hardr. 387. *Shelly's case*, 1 Rep. 98.

(*y*) *Stanley v. Towgood*, *supra*, *Burdett v. Withers*, 2 Nev. & P. 122.

(*b*) *Paradine v. Jane*, Aleyn, 27. *Brecon Company v. Pritchard*, 6 T. R. 750.

(*z*) *Mantz v. Goring*, 4 Bing.

house is burned by accident or otherwise, he is bound to rebuild it within a reasonable time. (c) It is not unusual in the covenant to repair to insert an exception of accidents by fire and tempest.

Expired lease.

Where a lease, containing a covenant by the lessee to keep the premises in repair, had expired, and he then verbally agreed to hold over, paying an additional rent, nothing more being expressed between the parties respecting the terms of the new tenancy, and the premises were consumed by fire. An action of *assumpsit* was brought, and the plaintiff declared, that in consideration that defendant had become plaintiff's tenant of a warehouse, &c., the defendant undertook to repair, and averring that defendant had continued his tenant, assigned as a breach that he had suffered the premises to remain out of repair. On the trial before Lord *Ellenborough*, it was insisted for the defendant, that a new holding had been created, without reference to the former lease. But his lordship was of opinion, that where a tenant holds over, he impliedly holds over subject to all the covenants in the lease which are applicable to his new situation; and that the mere advance of rent made no difference. (d)

Void lease.

The same principle applies to the case of a void lease, as when a lease having been granted by tenant for life, containing a covenant to repair, but not made in accordance with the power; the lease was assigned to the defendant, who after the death of the tenant for life, when the lease would determine, continued to pay the rent to the remainder-man for a short period, but taking the improved rent during the residue of the term. The premises being left out of repair,

(c) Year Book, 40 Edw. III. 6. a. Bullock v. Dommitt, 6 T. R. 650.
 Anon. Dyer, 33. a. pl. 10. Poole Pym v. Blackburn, 3 Ves. 34. And
 v. Archer, 2 Show. 401. S. C. see 2 Saund. 420. n. (2).
 Skin. 210. Compton v. Allen, (d) Digby v. Atkinson, 4 Campb.
 Style, 162. Lord Chesterfield v. 275. Beale v. Sanders, 3 Bing.
 Duke of Bolton, Com. Rep. 627. 850. N. S.

the landlord brought an action for damages, on an implied assumpsit to repair; and it was held he was entitled to recover, up to the end of the term mentioned in the lease, on the ground that the tenant was liable to all the stipulations contained in the lease, in the same way as a tenant is who holds over after the determination of the lease. But if a breach of the covenant to repair takes place during the *continuance* of the lease, (e) persons claiming under the lessee, but coming into possession after the determination of the lease, will not be liable on an implied promise to restore the premises to the same state in which they were at the commencement of the original lease. (f)

Where there is, besides a covenant to repair, a covenant by the lessee to insure for a certain sum, and the premises are burned, the lessee's liability to rebuild is not limited to the amount of the sum for which he covenanted to insure. (g)

As between landlord and tenant *at a rack-rent*, where the rebuilding or repairing of the party-walls becomes necessary pursuant to the statute 14 Geo. III. c. 78, (h) the tenant cannot be called upon to contribute to such rebuilding and repairs in virtue of an express covenant to keep the premises in repair. (i) For the statute meant to throw the burthen upon the owner of the *improved rent*. (k) And therefore the lessor of a house at a rack-rent (there being no other person entitled to *any* kind of rent,) is liable to contribute, although the lessee may have improved the premises: (l) and so the assignee of the lessee of premises at a fixed rent, which premises he has considerably improved,

but not to contribute to party walls,

(e) *Beal v. Sanders*, 3 Bing. 850. N. S.

(f) *Johnson v. Hereford Churchwardens*, 6 Nev. & M. 106.

(g) *Digby v. Atkinson*, *supra*.

(h) The 14 Geo. III. c. 78, was amended by the 25 Geo. III. c. 77, and by 1 & 2 Victoria, c. 75, in respect of manufactories of turpen-

tine, pitch, and tar.

(i) *Stone v. Greenwell*, cited 3 T. R. 461. *Moore v. Clark*, 5 Taunt. 90.

(k) *Southall v. Leadbetter*, 3 T. R. 458.

(l) *Beardmore v. Fox*, 8 T. R. 214.

unless the tenant be owner of the improved rent.

and consequently rendered of greater annual value, is not liable to be called upon for contribution under the statute, as the owner of the improved rent. (*l*) But where the tenant is in fact the owner of the improved rent, he, and not the ground-landlord, will be liable to contribute to the expense of party-walls: (*m*) as if the lessee of a house at a rack-rent underlet it at an advanced rent, he may be called upon to contribute under the statute; (*n*) and, according to the opinion of Lord *Kenyon*, the lessee will be liable where he assigns his lease, and receives a large sum of money for the purchase of it, though no improved rent be reserved to him. (*o*)

Where the defendant, who held a lease of land, entered into an agreement, in the month of July, to let the land to G., who was to build houses, and pay defendant a rent of 20*l.* a year; the houses were covered in by the end of September, and on the 30th of September the defendant assigned over the lease to another person. It was held that the defendant, being entitled to the improved rent at the time the houses were built, was liable to contribute to a party-wall, to which the houses were attached. And in the same case it was also held that the owner of the party-wall was not confined to ten days to give his notice; there being no adjoining house when the party-wall was built, but he might give the notice in a reasonable time after the adjoining houses were attached to it. (*p*)

In a case in which a tenant, after the expiration of a beneficial lease, rebuilt a house, which, subsequently to the determination of his lease, was consumed by fire; and in so doing, made use of the party-wall of the adjoining house; after which the ground landlord granted him a new lease, in consideration of the expense incurred in rebuilding, at a

(*l*) *Lambe v. Hemans*, 2 B. & A. & Pul. 303.
467.

(*o*) *Southall v. Leadbetter*, *supra*.

(*m*) *Peck v. Wood*, 5 T. R. 130.

(*p*) *Collins v. Wilson*, 4 Bing.

(*n*) *Sangster v. Birkhead*, 1 Bos. 551.

rent of seven guineas, the house being worth 60*l.* *per annum*, to hold from a day then past; the Court of Common Pleas thought the lessee could not be considered as the owner of the improved rent, and that no previous agreement for a new lease could be presumed from the retrospective *habendum* in the lease, so as to bring the case within *Peck v. Wood*, and therefore held that the owner of the adjoining house could not recover as against him a moiety of the expense of building the party-wall. (*q*)

In a case, in which the original tenant built the party-wall, and then underlet part of the adjoining land on a building lease, at a rent of 50*l.* The under tenant made use of the party-wall for building another house, which he let at a rent exceeding 50*l.*; it was held that the original tenant was the owner of the improved rent, and it seemed that the statute did not apply where the land adjacent to the party-wall was held under an agreement with the builder of it. (*r*)

A lessee for twenty-one years at a pepper-corn-rent for the first half year, and a rack rent for the rest of the term, who by agreement was to put the premises in repair, and had covenanted to pay the land-tax and all other taxes, rates, assessments, and impositions, having assigned his term for a *small sum* in gross, was held not to be liable to pay the expense of a party-wall, either by the provisions of the statute 14 Geo. III. c. 78, s. 41, or the covenant; for where the parties contract for a lease at a rack-rent, the landlord is the person who ought to bear the expense of the party-wall. (*s*)

But where the tenant of the house covenanted in his lease to pay a reasonable share and proportion of supporting, repairing, and amending all party walls, &c., and to pay all taxes, duties, assessments, and impositions parliamentary

(*q*) *Taylor v. Reed*, 6 Taunt. 249.

(*s*) *Southall v. Leadbetter*, 3 T. R.

(*r*) *Williams v. Pocklington*, 2

458.

B. & Ad. 878.

and parochial, "it being the intention of the parties that the landlord should receive the clear yearly rent of 60*l.* in net money without any deduction whatever;" and during the lease the proprietor of the adjoining house built a party-wall between that house and the house demised, under statute 14 Geo. III. c. 78, the Court of King's Bench held that it was the tenant, not the landlord, who was bound to pay the moiety of the expense of the party-wall: and Lord Kenyon said, "*Modus et conventio vincunt legem*. We collect the intention from the whole of the instrument. If this had rested itself merely on a covenant to pay taxes, &c., I should not have thought a tenant liable: but here is a covenant that the landlord should have the rent clear and net. A covenant is always taken most strongly against the covenantor. I cannot bring my mind to doubt from the whole but that the tenant should pay the whole." (*t*)

Where notice of pulling down and rebuilding a party-wall was given under the Building Act, and the tenant of the adjoining house, who was under a covenant to repair, finding it necessary in consequence to shore up his house, and to pull down and replace the wainscot and partitions of it, instead of leaving such expenses to be incurred and paid by the owner of the house giving notice, in the manner prescribed by the act, and afterwards paying the same to him upon demand, employed workmen of his own to do those necessary works, and paid them for the same; the Court held that he could not recover over against his landlord such expenses incurred by his own orders, and paid for by him in the first instance: all the powers and authorities given by the act in respect to any works to be done being given to the owner of the house intended to be pulled down and re-built; and the landlord of the adjoining house being only liable by the act to reimburse his tenant money paid by him to the other owner for such works as are authorized to be done by such other owner in respect of such adjoining house. (*u*)

(*t*) *Barrett v. Duke of Bedford*,
8 T. R. 602.

(*u*) *Robinson v. Lewis*, 10 East,
227.

Where one raising a party-wall, *bond fida* intended to comply with the directions of the Building Act, 14 G. 3, c. 78, but did not in fact do so, and injured the adjoining house, the owner of which brought trespass. It was held that the raising of the wall was to be considered as done in pursuance of the statute, and that the defendant was entitled to the protection given by the hundredth section, and that, the plaintiff not having given the notice, or commenced his action within the period prescribed by that section, the defendant was entitled to a verdict. (*v*)

The defendant is entitled to treble costs under the hundredth section of the act, upon nonsuit. (*w*)

Where an indenture of lease contains a general covenant to keep the premises in repair, with a clause of re-entry for a breach of covenant; and a further covenant that the tenant shall, within a certain time from notice being served upon him by the landlord, repair all defects specified by the notice, the first covenant in general will not be held to be restrained by the latter. (*x*) And so it was held that a covenant by the lessee to leave the premises in repair, and a covenant that the lessor might direct the lessee to complete the repairs, by giving six months' notice in writing, were distinct and separate covenants, and that the former was not qualified by the latter. (*y*) But where a lessee covenanted to repair the premises at all times, as often as need should require, *and at farthest within three months after notice*, this was held to be one entire covenant, the former part of which was qualified by the latter. (*z*)

Covenants
to repair, when
qualified.

- (*v*) Pratt *v.* Hillman, 4 B. & C. 269. 6 Dowl. & Ryl. 360, and see Wells *v.* Ody, 1 Gale, 137, 161. 2 C., M. & R. 128, 184. 3 Dowl. Prac. Ca. 799. 2 Camp. 520. *Vide* Doe dem. Morecraft *v.* Meux, 4 B. & C. 606. Doe dem. De Rutzen *v.* Meux, 5 Ad. & Ell. 277.
(*y*) Wood *v.* Day, 7 Taunt. 646. 1 B. Moore, 389.
(*z*) Horsfall *v.* Testar, 1 Moore, 89. 7 Taunt. 385.
(*w*) Collins *v.* Poney, 9 East, 322.
(*x*) Roe dem. Goatly *v.* Paine,

To what buildings a covenant to repair extends.

A general covenant by the lessee to repair, extends to all buildings erected during the term, as well as to the buildings demised. Therefore, if upon a demise of three houses with such a covenant, the lessee builds a fourth, he will be bound to repair this also: and if he covenant to pull down the three and rebuild them, and leave the said premises in repair, and he pull down the three, and build five in their place, he is bound by his covenant to deliver up all in repair. (a)

A lessee, who has erected fixtures for the purposes of trade upon the demised premises, and afterwards takes a new lease, to commence at the expiration of his former one, which new lease contains a covenant to repair, will be bound to repair the fixtures. (b)

A lease was made of a piece of ground and all the buildings thereon standing. The lessee covenanted to lay out the sum of 200*l.* within fifteen years in erecting and *rebuilding* of messuages or tenements *upon the ground and premises*; and from time to time and at all times all and singular the said messuages or tenements *so to be erected*, with all such other houses, &c., as should be thereafter erected to repair; and *the said demised premises* with all such *other* houses so well repaired, at the end of the term to deliver up, &c. The Court thought that this was merely a building lease; that the intention of the parties was that the old premises should be pulled down: and consequently that the covenant extended only to those newly erected, and was not broken by the pulling down of the old. (c)

Where a lessee covenanted to repair the four messuages demised; and within fifty years to take down the said demised messuages, *as occasion should require*, and in the place

(a) *Douse v. Earle*, 3 Lev. 264.
S. C. 2 Ventr. 126.

W. 2 B. & C. 608.

(c) *Lant v. Norris*, Burr. 287.

(b) *Thresher v. East London W.*

thereof to erect upon the premises four new brick messuages; the Court of Common Pleas intimated an opinion, that if within the fifty years the houses should be so repaired as to make them completely and substantially as good as new houses, the covenant would be satisfied without taking down the old houses: and that the words *as occasion should require* would raise a question of fact for a jury, whether such occasion did arise. (*d*)

The breaking a door-way through the wall of a demised house into an adjoining house, is a breach of the general covenant to repair. (*e*) And where the tenant of a house covenanted to repair the premises and all erections, buildings and improvements erected on the same during the term, the Court held that it was a breach of the covenant in the lessee to remove a verandah erected during the term, the lower part of which was affixed to the ground by means of posts. (*f*)

What is a breach of covenant to repair.

If lessee covenant to support and maintain the brick walls belonging to the premises, and he pulls down a brick wall which divides a front court yard from another court at the side of the house, it will be a breach of the covenant. (*g*) But an enlargement of windows, opening external doors, and taking down partitions, is not a breach of a covenant to repair, and keep in repair a dwelling-house, with all buildings, improvements, and additions set up or made by the lessee. (*h*)

Where a man covenants to *keep* buildings in repair, and he pulls them down, or suffers them to decay, he is immediately guilty of a breach of his covenant; and an action may be maintained against him before the term has ex-

(*d*) *Evelyn v. Raddish*, 7 Taunt. 411.

(*e*) *Doe dem. Vickery v. Jackson*, 2 Stark. 293.

(*f*) *Penny v. Brown*, *ibid.* 403.

(*g*) *Doe dem. Wetherell v. Bird*,

6 C. & P. 195, *et vide* *Corporation of London v. Venables*, *ibid.* 196. (*).

(*h*) *Doe dem. Dalton v. Jones*, 1 Nev. & M. 6. 4 B. & Ad. 126,

et vide *Doe dem. Vickery v. Jackson*, 2 Stark. 293.

pired. (i) But if he covenant to *leave them in as good a state* as he found them, and then pull them down, he will be guilty of no breach of covenant, for he may rebuild them; therefore, no action will lie till the end of the term. (k)

The tenant is not bound, under his covenant to repair, to be at the expense of renewing the works in an improved or more durable manner than before. (l)

Where the lessee covenanted to *maintain, sustain, and repair* two messuages; to an action for a bond given for the performance of these covenants, he pleaded that he had repaired all the messuages, with the exception of one kitchen; which was so ruinous that he could not repair it, but pulled it down, and rebuilt another in as short a time as possible; and that he had at all times well repaired the new kitchen. The Court, upon demurrer to this plea, decided that though it would have been good in an action of waste, yet that it was bad to that action, upon a covenant by which he had tied himself down to an inconvenience, which he ought at his peril to provide for. (m)

If a lessee covenant to contribute with the occupier of the lessor's land, to the keeping up the path used in common by them; and it is proved that the lessor always used a particular path, to which alone the covenant could apply, it may be inferred that the lessee took the soil demised to him, subject to the lessor's right of way, although in the lease there is a grant of all ways, without any exception. (n)

Inside painting. Under a covenant to substantially repair, uphold, and maintain a house, the tenant is bound to keep up the inside painting. (o)

(i) Shep. Touch. 173. Luxmore v. Robson, 1 B. & A. 585. As to an action on the case for permissive waste, *vide infra*.

(k) Shep. Touch. 173.

(l) Soward v. Leggatt, 7 C. & P.

612.

(m) Wood v. Avery, 2 Leon. 159.

(n) Oakley v. Adamson, 8 Bing. 356. 1 Moo. & Sc. 510.

(o) Mark v. Noyes, 1 C. & P.

265, per Abbott, C. J.

If a man covenant to repair a house, and it become ruinous by accident, the covenant will not be broken till after a convenient time for its reparation has elapsed. (*p*) And if he covenant to repair it before a particular day, and the reparation by such day be rendered impossible by the act of God, this is no breach of the covenant. But he is bound to repair it as soon as possible. (*q*)

If a lessee covenant to do all reparations to a house at his own costs and charges, and he cut down some of the trees of the ground demised for that purpose, this is not waste as before noticed, although he may be liable to an action of covenant. (*r*)

By the words "yielding and paying," in an indenture of lease, a *covenant* on the part of the lessee, to pay so much rent is implied in law: and where the lease is not by deed, the law will imply a *promise* by the tenant to pay the landlord for his permission to occupy the premises. If by a written agreement, premises are agreed to be let at a certain rent, this amounts to an agreement by the lessee to pay such rent; and therefore if there is a proviso for re-entry, on breach of any of the agreements, the lessor may enter for non-payment of rent, although there is no express agreement to that effect. (*s*)

3. Covenant to pay rent.

A special covenant is, however, generally inserted. But, in either case, the payment of rent is obligatory upon the lessee, so long as he continues to hold the premises without obstruction on the part of the lessor, or such persons as the lessor may have covenanted against. (*t*)

(*p*) Shep. Touch. 173. Sir Ant. Main's case, 5 Rep. 21.

(*q*) Shep. Touch. 174.

(*r*) *Ibid.* Anon. Moore, 23. Dyer, 198, *supra*, p. 239.

(*s*) Doe dem. Raine v. Kneller, 4 C. & P. 3.

(*t*) 1 Rol. Abr. 519. l. 26. Porter v. Swetnam, Style, 406, 431. Anon. 1 Sid. 447. Giles v. Hooper, Carth. 135. Dalston v. Reeve, Ld. Raym. 77. Jordan v. Twells, Ca. temp. Hardw. 172. Roper v. Lloyd, cited Cowp. 242. Webb v. Russell,

may be enforced though the premises be destroyed by enemies,

Therefore, where the lessor brought debt against his lessee upon a lease for years, rendering rent, and the lessee pleaded that Prince Rupert, an alien born, with an hostile army had entered upon the lessee, and expelled him out of possession, the Court of King's Bench resolved, that though the whole army had been alien enemies, he was still bound to pay his rent. (*u*)

or by fire,

So, though the premises be consumed by fire, the lessee will be liable to pay rent for them, notwithstanding their ruinous condition; and though the lessee has no enjoyment through the default of the lessor, and the latter has received the insurance money from the insurance office; (*w*) for if there is no express contract, the lessor is not bound to rebuild. (*x*) Nor will a Court of Equity grant an injunction against his proceeding for the rent at law, until he has rebuilt the premises, although in the covenant for repairs by the lessee, there is an exception of fire. (*y*)

or by tempest,

A distinction is taken between land overflowed by the sea or by fresh water, it being considered that in the former case, the tenant is entitled to an apportionment of rent, but not in the latter, by reason of his having the soil and fish, and the probability of the land being recovered; (*z*) but in general, though the land be destroyed by the act of God, still as the lessee is to have the advantage of casual profits, he must run the hazard of casual losses, and not lay the burthen of them upon his lessor; and, therefore, he will still be liable for the payment of his rent upon his covenant. (*a*)

3 T. R. 402. *Iggulden v. May*, 9 Ves. 330. Statute 11 Geo. II. c. 19, s. 14. 1 Wms. Saund. 241. b. n. (5).

(*u*) *Paradine v. Jane*, Aleyn. 26. S. C. Style, 47.

(*w*) *Leeds v. Chetham*, 1 Sim. 146.

(*x*) *Bayne v. Walker*, 3 Dow. 253.

(*y*) *Holtzappel v. Baker*, 18 Ves.

115. *Hare v. Groves*, Anstr. 687,

overruling *Camden v. Morton*, 2 Eden. 219. *Brown v. Quilter*, *ibid.* and *Steele v. Wright*, stated 1 T. R. 708.

(*z*) Roll. Ab. 236.

(*a*) *Richards le Traverner's case*, Dyer, 56. *a.* *Paradine v. Jane*, Aleyn, 28. Bac. Abr. *Rent*. M. (2).

So where the plaintiff declared upon an indenture of lease of the parsonage of Dale, by which the defendant covenanted to pay him the rent, which he had not done, the defendant pleaded that before any day of payment the ordinary sequestered the said parsonage for non-payment of the first-fruits. The Court held this plea to be bad, because it did not shew that any act was done by the plaintiff himself in his own default, (a) but this seems a very questionable case. Quære if by sequestration.

Upon a reservation of 5*l.* per acre during the last twenty years of a term, for every acre of meadow thereby demised which the tenant should plough, dig, or convert into tillage, during the said last twenty years of the term, and so after that rate for any greater or less quantity than an acre, or less term than a year, the rent is due in the last twenty years if the land be then ploughed, whether it were first ploughed within the last twenty years or before; and the rent continues payable during the twenty years, though the land be again laid down to permanent grass. (b)

By an indenture between A. of the first part, B. of the second part, and C. of the third part, A. demised to B. for years, a messuage and farm at a yearly rent, payable quarterly, and B. covenanted to pay the rent, at the days and in manner therein mentioned, and also to pay interest in case the rent should be behind three quarters; C. also covenanted that B. should at all times during the term, well and truly pay to A. the said rent at the respective days, and also interest, and should duly observe all the covenants, *and that in case B. should neglect to pay the rent for forty days, C. should pay on demand.* It was held that this was a qualified covenant on the part of C., and that he was not chargeable until after forty days and demand made; and that A. having declared generally, assigning for breach, rent arrear, and it appearing upon oyer that the covenant contained this qualification, the breach was ill assigned, and there being

(a) *Jeakill v. Linne*, Hetl. 54. (b) *Birch v. Stephenson*, 3 Taunt. 469.

general damages upon the whole declaration, though it contained other breaches which were well assigned, the judgment was arrested. (c)

Apportionment
of rent.

The lessee's liability to pay rent according to his covenant or agreement may be destroyed, abridged, or altered, either by act of the parties, or by act of law. The doctrine of *apportionment* becomes, therefore, an important consideration, upon which questions of nicety have frequently arisen. 1. Where the reversion of the lessor becomes severed by alienation, and so passes to different persons; 2. Where the tenant's interest in part of the estate is destroyed, and the rent is payable only in respect of the residue; 3. Where the interest of the lessee expires before his rent becomes due; and, 4. Where the lessor dies before the rent becomes due, but the lessee's interest does not thereby expire.

1. Where the
reversion is
severed,
by act of the
lessor;

1. As the rent is incident to the reversion, whenever the reversion is severed, either by act of the parties, or by act of law, the rent shall be apportioned. Thus, where the lessor grants part of his reversion to a stranger, the rent shall be apportioned; (d) and so where a man leases for years freehold, and also copyhold lands, and afterwards grants the reversion of the freehold lands to a stranger, the rent shall be apportioned, as issuing out of the entire land, copyhold as well as freehold. (e) It does not, however, rest with the lessor, in the case of such partial alienation, to apportion the rent as he pleases; the apportionment can only be rendered binding by the lessee's consenting to it, or by the settlement of a jury. (f) And since the rent will, in the case of an alienation, be apportionable solely because it is incident to the reversion, it follows only upon alienation by the lessor; for although the lessee alien the whole or part of his estate, he will still remain liable for the whole of

but the rent
will not be ap-
portionable
by the lessee's
alienation,

(c) *Sicklemore v. Thistleton*, 6 M. & S. 9.

(d) *Co. Lit.* 148. a. 1 *Rol. Abr.* 234. *ibid.* 235.

(e) *Collins v. Harding*, 1 *Rol. Abr.* 234. l. 29. *S. C.* 13 *Rep.* 57.

Cro. Eliz. 607. 622. *Moore*, 544. *Godb.* 139.

(f) *Bliss v. Collins*, 5 B. & A. 876. 4 *Madd.* 229, overruling

Walker v. Maunde, 1 *Jac. & Walk.* 181.

the rent. (*g*) In case of an assignment of part of the estate the landlord will, it is true, have a right to call upon the assignee for his proportion of the rent: but the effect of an assignment by a *lessee* is not to discharge himself, but to give his lessor a double remedy for his rent; against himself for the whole in respect of his privity of contract, and against the assignee for the whole or the part in respect of his privity of estate. (*h*) The case of an assignee is different; because, as he is only liable to the superior lessor in respect of his privity of estate, an assignment of part by him will discharge him for so much as against the lessor, though he will still remain liable to the lessee, his assignor, upon any *express* covenant in the assignment to pay the rent; how far he may be liable to his assignor in the absence of any express covenant, will be hereafter considered. (*i*) The lessee, therefore, can in no case discharge himself of his liability for the whole rent by his own act. And if there be two joint tenants of a term, and one assign over his part to the other, the rent reserved upon this term shall not be apportioned; for the lessees, by their own act, cannot divide the rent, so as to put the lessor to several remedies for it. (*k*)

With respect to the severance of the reversion by act of law; where a man being seised in fee of *Black-acre*, and possessed of a term of twenty years in *White-acre*, leases both together for ten years, rendering rent, and dies, by which the reversion of *Black-acre* goes to his heir, and of *White-acre* to his executor, the rent shall follow the respective reversions, and be apportioned accordingly. (*l*) And so if tenant in fee make a lease for years, and die, and his wife be endowed, one-third of the rent will be payable to her. (*m*) In like manner, if a man make a lease of two acres of land,

or by act of law;

as where the lands go partly to the lessor's heir, and partly to his executor; or his wife is endowed: or part of the

(*g*) *Rushden's case*, Dyer, 4. *b*.
Broom v. Hore, Cro. Eliz. 633.
Ards v. Watkin, *ibid.* 637.

(*h*) *Ibid.* *Stevenson v. Lambard*,
 2 East, 580. *Merceron v. Dowson*,
 5 B. & C. 479. And see *infra*,
 Chap. III.

(*i*) *Vide infra*, Chap. III.

(*k*) *Bailiff of Ipswich v. Martin*,
 1 Rol. Abr. 235. l. 35.

(*l*) *Moody v. Garnon*, 1 Rol. Abr.
 237. l. 3. S. C. 3 Bulstr. 153.

(*m*) 1 Rol. Abr. 237. l. 12.

lands are
gavelkind, &c.

one held in *Borough English*, and the other in *Gavelkind*, and have issue two sons, and die, the rent shall be apportioned according to the course of the descent. (n)

2. Where the
tenant's in-
terest in part
of the lands
is destroyed ;

2. Rent is apportionable where the lessee's interest in part of the thing demised is *extinguished* either by the act of the parties, by act of law, or by act of God.

by act of the
parties.

If therefore the tenant surrender a portion of his estate to the lessor, the rent shall be apportioned, and payable only in respect of the residue. (o)

Where the
lessee forfeits,

Or if the lessor enters upon part of the tenant's land for a forfeiture, or if part of the lands be recovered in an action of waste, the rent shall be apportioned *pro tanto* : (p)

Wrongful
entry of lessor
suspends the
whole rent.

If the lord enter *wrongfully* upon *part* of the land and evict the tenant, the rent is suspended for the *whole*, and no apportionment shall be made. (q) The reason for which, according to Lord Coke, is, that though a rent service may be *extinguished* in part, and apportioned for the residue, it cannot by the act of the parties be *suspended* in part, and apportioned for residue. But this position was combated and denied to be law by Lord Hale and the Court of King's Bench, in the case of *Hodgins v. Robson* and *Thornborough* ; (r) though they agreed that the wrongful eviction of the tenant by the lord out of part suspended the whole rent. In order, however, to operate as a suspension of the rent, it must be an *expulsion* or *eviction*, and not a mere trespass or disturbance of the enjoyment of the lands. (s)

(n) Rushden's case, Dyer, 4. b. Ewer v. Moyle, Cro. Eliz. 771.

the King, *ibid.* ; *et vide* Neal v. Mackenzie, *infra*.

(o) Smith v. Malings, Cro. Jac. 160. Fishe v. Champion, 1 Rol. Abr. 234. l. 48. *ibid.* 235. l. 20. Anon. Moore, 114.

(r) 1 Ventr. 277. S. C. 2 Lev. 143. 1 Pollexf. 141. 3 Keb. 500, 595, 518, 541, 557.

(p) Co. Lit. 148. b. Walker's case, 3 Rep. 22. 1 Rol. Abr. 235. l. 23, 25.

(s) Roper v. Lloyd, Sir T. Jones, 148. Reynolds v. Buckle, Hob. 326. Bushell v. Lechmore, Lord Raym. 369. Hunt v. Cope, Cowp. 242. Salmon v. Smith, 1 Saund. 204, n. (2).

(q) Co. Lit. 148. b. Walker's case, 3 Rep. 22, except in the case of

And if the lessee be evicted by a stranger, out of a part only, by force of a paramount title, that will not operate as a suspension of the whole rent, but it shall be apportioned and payable for the residue. (t)

If at the time of entry by the lessee, a part of the land is in the possession of a third party, under a prior demise from the same landlord, extending beyond the period of the second demise, the demise of the part leased to another will be wholly void, and the rent will not be apportionable, nor will the lessor be entitled to distrain for the rent or any part of it. (u)

If part of the lands be in possession of prior tenant.

A lessee took possession of a farm under an agreement which his landlord in a material point failed to fulfil, and occupied the premises for a year. In an action for the use and occupation of the farm, the Court were of opinion that an agreement between lessor and lessee was only evidence of the amount of rent to be paid where the lessee had enjoyed *under such agreement*; and that the lessor in the present instance, having failed to fulfil the agreement, in the chief object which had induced the lessee to propose becoming a party to it, the lessee could scarcely be said to have held under it; but that *at all events*, the defendant in an action for use and occupation, as in an action of debt for rent, might shew an eviction of the whole or of part; and that, in case of an eviction of part, the jury must ascertain, independently of any agreement, what the defendant ought to pay. (v)

Possession under agreement.

Where a man makes a lease of lands, of part of which he is seised in fee, and of the other part only for life, with a power of leasing, and his lease is not warranted by the power, so that upon his death the interest of the lessee is determined

Apportionment by determination of lessor's interest in part.

(t) Co. Lit. 148. *South v. Marlings*. Cro. Jac. 160. 1 Rol. Abr. 235. l. 32. *Infra*.

of the Court of Exchequer, 1 C., M. & R. 84.

(v) *Tomlinson v. Day*, 2 Brod.

(u) *Neal v. Mackenzie*, 1 Mees. & W. 747. Reversing the judgment

& Bing. 682.

pro tanto, the rent shall be apportioned in respect of that part of the lands of which the lessor was seised in fee, and in which the lessee's interest still survives. (w)

Quære if lessee underlets part to the lessor.

It is more than once laid down by Lord *Coke*, that where the lessee underlets part of the land to the lessor, the rent is *suspended* for the whole, and cannot be apportioned. (x) But this position was not only denied by the Court, in the case above alluded to, as being without reason or authority, but Lord *Hale* cited authorities to the contrary, and observed, "that if the law should go upon this difference, it would shake abundance of rents, it being a frequent thing for a lessor to hire a room or other part of the thing demised for his conveniency." (y)

Loss of part of land by act of God, as where part of the land is flooded by the sea,

secus, by fresh water.

It seems that, where part of the land is lost to the lessee by the act of God, he may insist that the rent be apportioned. As if *the sea* break in and overflow a part of the land, the rent shall be apportioned; for though the soil remains to the tenant, yet as the sea is open to every one, he has no exclusive right to fish there. For which reason a distinction is made between the sea and fresh water; because, though the land be covered with fresh water, the right to taking the fish is vested exclusively in the lessee, and consequently the rent shall not be apportioned. (z) And, it is said, if the land leased be burned with *wild fire*, (an accident not very likely to occur,) the rent shall be apportioned, because some benefit may still be made of it. (a)

No apportionment where part of the things demised, being chattels, perishes.

A lease for years was made of lands, together with a flock of sheep, rendering a certain rent, all the sheep died; and the question was, whether the rent were apportionable? It does not appear that any decision took place; though the

(w) Doe dem. *Vaughan v. Meyler*, 2 M. & S. 276. 277.

(x) Co. Lit. 148. b. *Rawlyns's case*, 4 Rep. 52, 3rd Resolution. 268.

Ascough's case, 9 Rep. 134.

(y) *Hodgkins v. Robson*, 1 Ventr. 56. a.

(z) 1 Rol. Abr. 236. l. 46, *supra*.

(a) *Ibid.* l. 15. But see *contra* *Richards le Taverner's case*, Dyer,

stronger opinion seems to have been with the affirmative. (b) But in a subsequent case, where a lease was made of lands and goods at a certain rent, and the tenant was evicted out of the lands by means of a statute made by the lessor's predecessor, the Court held that the rent issued out of the lands only, and they being gone, the lessor was entitled to no apportionment in respect of the goods. (c)

Rent being thus apportionable in respect of the land out of which it springs, the next question is, whether it be apportionable in respect of time? In considering which it is to be observed, that though rent is demandable at sun-set of the day upon which it is reserved, (d) and may be voluntarily paid by the tenant at any time during that day, (e) yet as in strictness the tenant has all the day to pay it, it is not due and recoverable till midnight. (f) And, therefore, if one lease lands for years, reserving rent yearly, and before the expiration of the year the lessee be evicted, the lessor shall have no rent, for the rent shall not be apportioned in respect of time. *Annua nec debitum judex non separat.* (g)

3. Where the lessee's interest determines before the rent becomes due.

Upon this principle, by the common law, if tenant for life made a lease for years, reserving rent, and died the day before the rent became due, the rent was lost both to the executor and the remainder-man; and was recoverable neither at law nor in equity. (h) It could not indeed have gone to the remainder-man, because it did not accrue in his time: and the tenant's estate was absolutely determined by the lessor's death: but that the tenant should pay no rent at

By the death of the lessor, tenant for life.

(b) Richards le Taverner's case, *ub. sup.*

(c) Emott v. Cole, Cro. Eliz. 255. S. C. Dyer, 212. b. in marg. And see Read v. Lawsne, *ibid.* That the rent issues only out of the lands, see Spencer's case, 5 Rep. 17, and Newman v. Anderton, 2 N. R. 224.

(d) Co. Lit. 202. a. Dennis v. Borden, 1 And. 253.

(e) William Clun's case, 10 Rep. 127. b.

(f) Duppa v. Mayo, 1 Saund. 287.

(g) Countess of Plymouth v. Throgmorton, 1 Salk. 65.

(h) William Clun's case, 10 Rep. 127. b. Jenner v. Morgan, 1 P. W. 392. Edwards v. Countess of Warwick, 2 P. Wms. 176. Hay v. Palmer, *ibid.* 502.

Apportion-
ment under
11 Geo. II.
c. 19.

all to the representative of the lessor for the time he had enjoyed the profits of the lands appeared a very hard case; and to remedy this, the Court, in one instance, went as far as it possibly could, consistently with the notion that rent is not payable until the last moment of the day upon which it becomes due; for it seems to have been settled, that if rent became due upon *Michaelmas* day, and the lessor lived until that day, but died before midnight, whereby the lease was determined, though the rent could not be demanded till after midnight, yet as a voluntary payment might have been made in any part of the day, sooner than the rent should be lost, it should go to the executor. (i) But the statute 11 Geo. II. c. 19, at length gave a remedy for this hardship; and by the 15th section, after reciting "that whereas where any lessor or landlord having only an estate *for life* in the lands, tenements, or hereditaments demised, happens to die, before, or on the day, (k) on which any rent is reserved or made payable, such rent, or any part thereof, is not by law recoverable by the executors or administrators of such lessor or landlord; nor is the person in reversion entitled thereto, any other than for the use and occupation of such lands, tenements, or hereditaments, from the death of the tenant for life; of which advantage hath been often taken by the under-tenants, who thereby avoid paying any thing for the same;" it is enacted that, from and after the 24th of June, 1738, where any *tenant for life* shall happen to die before or on the day on which any rent was reserved upon any demise or lease of any lands, &c., which determined on the death of such tenant for life, that the executors or administrators of such tenant for life shall and may in an action on the case, recover from the undertenant or undertenants of such lands, &c., of the tenant for life, on the day on which the same was made payable, *the whole*, or if before such day, then a proportion of such rent, according to the time such tenant for life lived of

(i) Lord Strafford v. Lady Wentworth, 9 Mod. 21. 1 P. Wms. 180. Prec. in Chan. 555. Lord Rockingham v. Penrice, 1 P. Wms. 177.

(k) So that the distinction resorted to in the cases last cited, was either unknown to or rejected by the legislature.

the last year, or a quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof respectively.

Where tenant for life, with power to lease by deed, demises by parol from year to year, or in such a manner as is not warranted by the power, and dies before the tenant's rent becomes due, the interest of the lessee is determined with the life of the lessor, and the rent shall be apportioned under the statute. (l)

Where tenant for life, with power to lease, demises in a manner not warranted, and dies.

The statute of the 11 Geo. II. c. 19, in terms applies to *tenant for life* only; and it consequently became a question whether this statute could extend to the leases of tenant in tail, where such leases were void as against the issue in tail or the remainder-man or reversioner, and expired upon the death of tenant in tail, or to leases by tenants for years determinable upon lives, and by tenants *per autre vie*.

Whether this statute extends to the leases of tenant in tail?

In *Paget v. Gee* (m) tenant in tail, with remainder to the defendant in fee, made a lease for years, and died, without issue, a week before the day of payment of the half-year's rent. The lessee at the day paid all the half-year's rent to the defendant; whereupon the executor of the tenant in tail applied to the Court of Chancery for an apportionment of the rent. Lord Chancellor *Hardwicke* said, "This point has never been determined; but this is so strong a case that I shall make it a precedent. There are in it two grounds for relief in equity: the first *arises on the statute 11 Geo. II.*; the second *arises on the tenant's having submitted to pay the rent to the defendant.* The relief arising upon this statute is either from the strict legal construction, or equity formed upon the reason of it. And here it is proper to consider, what the mischief was before the act, and what remedy is provided at common law. If tenant for life, or any who had

Paget v. Gee.

(l) *Ex parte Smyth*, Swanst. 337. 6 Madd. 207.

(m) *Larkson v. Lord Scarborough*, cited *ibid.* 354. *Symons v. Symons*, (m) Amb. 198, and more at large in Burn's Just. tit. *Distress*.

a determinable estate, died but a day before the rent reserved on a lease of his became due, the rent was lost: for no one was entitled to recover it. His representatives could not, because they could only bring an action for the use and occupation; and that would not lie where there was a lease, but debt or covenant: nor could the remainder-man, because it did not accrue in his time. Now this act appoints the apportioning the rent, and gives the remedy. But there are two descriptions of persons to whose executors the remedy is given: in the preamble, it is one having only an estate for life; in the enacting part it is tenant for life. Now tenant in tail comes expressly within the mischief. I do not know how the judges at common law would construe it: but I should be inclined in this Court to extend it to them. I should make no doubt, were this the case of tenant in tail after possibility of issue extinct; for he is considered in many respects as tenant for life only: he cannot suffer a recovery; he may be enjoined from committing waste, of trees growing for ornament or shelter; though not from committing common waste, being considered as to that as tenant in tail. Were it the case of tenant for years determinable on lives, he certainly must be included within the act, though it says only tenant for life; it would be playing with the words to say otherwise. These cases shew the necessity of construing this act beyond the words. Tenant in tail has certainly a larger estate than a mere tenant for life; for he has the inheritance in him, and may, when he pleases, turn it into a fee; but if he does not, at the instant of his death he has but an interest for life. Such too is the case of a wife, tenant in tail *ex provisione mariti*. Upon this point I give no absolute opinion. As to the equity arising from the statute, I know no better rule than this, *equitas sequitur legem*. Where equity finds a rule of law agreeable to conscience, it pursues the sense of it to analogous cases. If it does so as to maxims of the common law, why not as to the reasons of acts of parliament? Nay, it has actually done so, on the statute of forcible entry; upon which this Court grounds bills, not only to remove the force,

but to quiet the possession. That act requires a legal estate in possession; this Court extends the reason to equitable interest. But I ground my opinion in this case upon the tenant's having submitted to pay the rent. He has held himself bound in conscience to pay it for the use and occupation of the land the last half-year. He paid it to the defendant, which he was not bound to do in law: and in such a case the person he pays it to shall be accountable, and considered as receiving it for those who are in equity entitled to it. The division must be that prescribed by the statute; and then the plaintiff is entitled to such a proportion of the rent as accrued during the testator's lifetime." And it was decreed accordingly. (n)

Nearly the same point arose in *Vernon v. Vernon*; H. V., tenant in tail male died, an infant, by which I. V., one of the plaintiffs, became tenant in tail of the estate. The infant's guardian had let some leases of the estate of which he was tenant in tail: but other tenants, who had not leases, continued as tenants from year to year; their rents were payable half-yearly, at *Lady-day* and *Michaelmas* in every year, which demises expired on the day of the death of H. V. These rents having been paid into the hands of the receivers, the question was, whether the administratrix of H. V., the tenant in tail, was entitled to a proportion of the rents. The Master having reported this proportion to amount to 900*l.*, and exceptions being taken, the cases of *Paget v. Gee*, and *Lord Strafford v. Lady Wentworth* (o) were cited in support of the apportionment; and it was said that in *Whitfield v. Pindar*, (p) where tenant in tail, remainder to others in tail, made a lease, and died three weeks after the rent-day, it was held that there should be an apportionment, though the lease was void against the remainderman.

The Lord Chancellor (*Thurlow*,) said, "The case of *Paget*

(n) *Paget v. Gee*, *ub. sup.*

(p) Com. Pleas, Hil. Term, 1781.

(o) *Infra*, 277.

Vernon v. Vernon.

v. Gee seems rather to be a decision of what the statute ought to have done, than what it has done: but the question here seems to turn on another ground, that the tenant, holding from year to year, or from period to period, from a guardian, without lease or covenant, cannot be allowed to raise an implication in his own favour, that he should hold without paying any rent to any body." (q)

These two cases left the point still doubtful; and, with respect to the case of *Whitfield v. Pindar*, it appears, from what fell from Lord Eldon in *Hawkins v. Kelly*, (r) that the rent had already been paid by the tenant to the remainder-man; so that it was not a question between the executor and the tenant, but between the executor and the remainder-man; and consequently that it fell completely within Lord Hardwicke's doctrine in *Paget v. Gee*.

It seems, however, clear, that where the remainder-man had actually received the rent, equity would compel an apportionment in favour of the executor of tenant in tail; and according to *Whitfield v. Pindar*, such proportion would at law be money had and received by the remainder-man to the executor's use. In the case of tenant for life, equity has relieved in like manner; for where a tenant for life made a lease for years reserving rent at *Lady-day* and *Michaelmas*, and died intestate at two o'clock in the afternoon on *Michaelmas* day, and the tenants paid the rent to the remainder-man, Lord Chancellor Macclesfield decreed that, as he had no right to receive it, he should pay it over to the administrator of the tenant for life, whose right to it was admitted by the payment of the tenants. (s)

A lease for years was made by a rector, reserving rent at *Michaelmas*, which became void in *March* by his death.

(q) *Vernon v. Vernon*, 2 Br. Ch. Rep. 659.

(r) 8 Ves. 312. And see *ex parte Smyth*, Swanst. 337, and the re-

porter's elaborate note, *ibid.*

(s) *Earl of Strafford v. Lady Wentworth*, *supra*.

The new incumbent, at the *Michaelmas* next after he was inducted, received the rent from the preceding *Michaelmas*; upon which the executors of the deceased rector filed a bill for an apportionment; which was decreed accordingly. (t)

It further appears from *Vernon v. Vernon*, that even supposing the statute not to extend to tenant in tail, yet where his tenant held *without a lease*, the Court would not suffer him to set up a tenancy for a fixed period, but would treat his occupation as a tenancy at will, and compel a proportionable payment of rent.

In a modern case a point was made upon the accounts of the receiver, whether the tenant for life, having died in the middle of the year, the land-tax, quit-rents, and other charges, should be borne entirely by the estate of his son, the infant remainder-man in tail; they having actually become due after the death of the tenant for life; or, whether there should be an apportionment. It was argued for the infant tenant in tail, that quit-rent and land-tax are due *de die in diem*, and capable of being apportioned; and therefore that an account should be taken by an equitable construction of the statute. But Sir W. Grant, M. R., was of opinion that the statute had no application to the case. The argument shews, (said his honour,) that it might be very reasonable to make such a statute, as to the apportionment of taxes between the tenant for life, and the remainder-man: but the statute of Geo. II. has no reference to that case; giving the tenant for life the benefit only as against the tenant.

Many of the difficulties before stated are removed by the 4 and 5 Wm. IV. c. 12, which has enacted, that rents reserved and made payable on *any* demises, or leases which had been or should be made, and which leases or demises determined, or should determine on the death of the person *making the same*, (although such person was not strictly

(t) *Hawkins v. Kelly*, 8 Ves. 308. *Sutton v. Chaplin*, 10 Ves. 66.

tenant for life thereof); or on the death of the life or lives for which such person was entitled to such hereditament should, so far as respected the rent reserved by *such* leases, and the recovery of a proportion thereof by the person *granting the same*, his or her executors or administrators (as the case might be) be considered as within the provisions of the act of the 11 Geo. II. c. 19.

This statute applies to leases made by the party who, or whose representatives claim the rent, and does not appear to include the case of a lease not created by the party himself, although his interest determines by his death; as in the case of an existing tenancy from year to year created by a tenant in fee, who devises the lands to a person for life; this person dies within the first half year of the tenancy from year to year, accruing in his time; and consequently, before he had a right to determine the legal tenancy, and create a new tenancy determinable on his own decease. (u)

4. Where the lessor dies before the rent becomes due, but the tenant's estate is not thereby determined.

4. Where the lessor, being tenant in fee dies, *after* the rent has become due, it will be payable to his executor; if he die *before* it becomes due, to the heir or remainder-man, And so of tenant for life, where the lease is *not* determined by his death.

It is to be remembered that the rent, though demandable at sunset, (v) does not become due until the very last minute of the day upon which it is reserved. Consequently, if the lessor die before midnight, his executor cannot claim any part of it unless it is apportionable; but it will pass along with the land to him in remainder, or reversion. And so it was expressly laid down by Lord *Hale* in the case of *Duppa v. Mayo*. (w)

And accordingly it has been lately decided, that where

(u) *Botheroyd v. Woolley*, 5 Bosden, 1 And. 253; *et vide infra* Tyrw. 522.

(w) 1 Saund. 287.

(v) Co. Lit. 202. a. *Dennis v.*

rent was reserved, payable quarterly, and the tenant for life, with a power to lease, died on the quarter-day before midnight, the rent was payable to the remainder-man, and not to the personal representative of the lessor. (x)

It seems in one case to have been agreed, that, where a lease for years is made by tenant in fee, or for life, reserving rent half-yearly, as at Michaelmas or Lady-day, *or ten days after each feast*; although the rent may be paid by the lessee, at his option, either at the feast day, or ten days afterwards; yet if he omit to pay it upon the feast day, and before the ten days are expired the lessor die, the rent will then be payable to the heir or remainder-man, and not the executor of the lessor. (y)

The result of all which authorities amounts to the following rules:—1. Where tenant in fee makes a lease reserving rent on a particular day, and dies upon that day before midnight, his heir, or devisee, and not his executor, shall have the rent.

2. Where tenant in tail dies under similar circumstances, leaving issue, having made a lease pursuant to the statute 32 Hen VIII. c. 28, the issue in tail, and not his executor shall have the rent.

3. If tenant for life make a lease under a power, and die under the like circumstances, the remainder-man, and not the executor, shall have the rent.

The statutes 11 Geo. II. c. 19, and 4 & 5 Wm. IV. c. 12, apply to none of these cases, because the lease is not determined by the death of the lessor, or of the person or persons for whose life or lives such lessor was entitled.

(x) *Norris v. Harrison*, 2 Mad. 227, 233. S. C. Yelv. 167. And see Ch. Rep. 269. Lord Strafford *v.* Lady Wentworth,

(y) *Barwick v. Foster*, Cro. Jac. ante, p. 266.

4. If tenant for life, with power to lease, make a lease not warranted by the power, and die, the rent shall cease with his death, and the executor be entitled to an apportionment. And so in the ordinary case of a lease by mere tenant for life, (x) or by any person whose estate shall determine on his own death, or on the death of any other person.

5. The statute of the 4 & 5 Wm. IV. c. 12, does not seem to apply to cases in which the lease was not made by the party having the determinable estate. (a)

Apportionment must be according to value.

Lastly, it is to be observed, that the apportionment must be made with reference to the value, and not to the quantity of the lands, &c., demised. (b)

Deduction in respect of land-tax.

By the general land-tax act, (38 Geo. III. c. 6. s. 17,) “the tenants of all houses, lands, tenements, and hereditaments, which shall be rated by virtue thereof, are required and authorised to pay such sum or sums of money as shall be rated upon such houses, &c., and to deduct out of the rent so much of the said rate as in respect of the said rents of any such houses, &c., the landlord should or ought to pay and bear. And the landlords, both mediate and immediate, according to their respective interests, are required to allow such deductions and payments, upon the receipt of the residue of the rents.” (c)

(z) In the case of *Bentham v. Alston*, 2 Vern. 204, an incumbent of a parsonage, jointly with the grantee of the next avoidance, made a lease of the tithes, rendering rent half-yearly, viz. at *Midsummer* and *Christmas*. Before *Midsummer*-day the incumbent died. The grantee of the next avoidance filed a bill in equity to recover the half-year's rent; and it was objected, that if the rent were payable to any one, the executors of the late incumbent had a better right than the plaintiff.

No judgment was given; but the Court recommended the parties to compromise the matter. A decree was made by consent, viz., that the tenants should pay the rents to the new incumbent, who should indemnify them against the claim of the executor of the prior incumbent. See note by Mr. Raithby.

(a) *Vide supra*, p. 270.

(b) *Smith v. Malings*, Cro. Jac. 160.

(c) This was an annual act, but is now made perpetual by 38 Geo.

But the tenant will be entitled to deduct no more than is payable in respect of the actual rent reserved to the landlord; and, therefore, under a covenant in a building lease by the tenant to pay all the taxes, except the land-tax, the tenant can only deduct the land-tax, as assessed upon the premises *according to the rent the landlord receives*, and not according to the improved value. (c) after what rate to be made.

Thus, where the defendant, who was landlord to the plaintiff, covenanted in the lease to pay the land-tax, and save the plaintiff harmless: and the premises were taxed at the rate of 150*l.* *per annum*, the defendant receiving only the rent of 120*l.* *per annum*, an action was brought on this covenant; the Court resolved, that the covenant was satisfied by the payment of the tax at the rate of 120*l.* (d)

The lease of premises had been granted to the defendant for the term of fifty years, in consideration of a premium of 850*l.*, at the yearly rent of 5*l.* 7*s.* 6*d.* payable quarterly, and without any deduction or abatement for any rates, taxes, or assessments, except the land-tax and property-tax. The land-tax amounted to 3*l.* 6*s.* 8*d.* *per annum*. *Abbott, C. J.*, ruled that the tenant was entitled to deduct for no more than the tax assessed upon the amount of the rent. (e)

So where a lease contained such a covenant and exception, together with a covenant by the tenant to lay out 400*l.* within the first four years, in building four dwelling-houses on the land demised, which had been assessed at 3*l.* 8*s.*; the house being built, the old assessment was continued, and a separate assessment of 5*l.* 12*s.* was made for the new houses; separate receipts being given by the collectors for the respective assessments; the tenant paid both, and

III. c. 60; 42 Geo. III. c. 116. As to deductions under the property tax act, (46 Geo. III. c. 61,) now repealed, *vide* *Denby v. Moore*, 1 B. & A. 123.

(c) *Hyde v. Hill*, 3 T. R. 377.

Barnfather v. Lee, *ibid.* 379. n. (e).

(d) *Yaw v. Leman*, 1 Wils. 21.

(e) *Whitfield v. Brandwood*, 2 Stark. 440. *et vide* *Skerrington v. Andrews*, Comb. 483.

deducted the amount out of his rent, according to the provisions of the statute 28 Geo. III. c. 2, ss. 17 & 35; the Court were clearly of opinion, that he had only a right to deduct so much of the land-tax as was payable in respect of the land before its improvement. (f)

Where a tenant entered into a covenant for the payment of 80*l.* yearly rent, all taxes *thereon* being to him allowed; and also that he would pay all *further and additional* rates on the premises, or on any additional buildings or improvements made by him; and the landlord covenanted to pay all rates on the premises or on the tenant, *in respect of the said yearly rent of 80*l.* except such further or additional taxes*; the Court (remarking upon the obscurity in the deed,) decided that the tenant was bound to defray all increase of the old as well as any new rates, beyond the proportion at which the premises were rated at the time of making the covenant. (g)

When to be
made :

The tenant ought, it seems, to deduct every year's tax from every year's rent: for if the deduction be not made from the rent of the current year, the tenant will not be allowed to make the deduction in any subsequent year, (h) or to recover back from the landlord the amount of the tax so omitted to be deducted. (i)

Where it was provided, by a local act, that a drainage tax should be paid by the tenants of the lands and grounds charged with the same, who might deduct and retain the same out of the rents payable to their landlords; and also that in case of neglect to pay, the tax might be levied by distress on the goods and chattels which should be found on the lands charged with the tax in arrear; and if the same should be untenanted, or no sufficient distress could be

(f) Hyde v. Hill, Barnfather v. Lee. *supra*.

(g) Graham v. Wade, 16 East, 29.

(h) Stubbs v. Parsons, 3 B. & A. 516.

(i) Andrew v. Hancock, 1 Brod. & Bing. 37. Spragg v. Hammond, 2 Brod. & Bing. 59, *et vide* Watson v. Home, 7 B. & C. 285.

found, the lands and grounds chargeable should remain as a surety for the payment thereof, and might be taken possession of, and let, in discharge of the tax. It was held that the tenants to be charged with the tax, were those in whose time the tax accrued due, and not the tenants for the time being; and therefore, where an outgoing tenant having paid his rent in full, had left property on the premises which was afterwards distrained for the tax due during his tenancy, and he was obliged to pay it:—the Court decided that he might recover the same in an action against the landlord for money paid. (*l*)

By the 42 Geo. III. c. 116, parties who have redeemed the land-tax, which by agreement was payable by the tenant, may distrain for the amount as additional rent. It has been decided, that if the landlord let the premises at one-third of the value at a premium, and afterwards redeem the land-tax, he will be entitled to receive from the tenant an annual payment equal to two-thirds of the land-tax redeemed. (*m*)

Land tax redeemed.

Though the statute calls upon the tenant to pay the land-tax in the first instance, it does not preclude the parties from agreeing between themselves that no deduction shall afterwards be made, but that the whole burden shall be borne by the tenant. Where, therefore, the tenant covenants to pay rent “clear of all taxes or assessments whatsoever,” such a covenant will destroy his right to deduct for the land-tax; unless the lease contain any express agreement to the contrary. (*n*) And so if the covenant be to pay

The tenant may covenant against the deduction.

(*l*) *Dawson v. Linton*, 5 B. & A. 521.

(*m*) *Ward v. Const*, 10 B. & C. 655. 5 Man. & Ryl. 402.

(*n*) *Brewster v. Kidgill*, or *Kitchen*, 12 Mod. 166. S. C. Ld. Raym. 317. 1 Salk. 198. 5 Mod. 368. *Carth.* 438. *Holt*, 669. In this case the nature and origin of taxes is stated with great clearness by Lord Holt. *Giles v. Hooper*,

Carth. 135. *Hopwood v. Barefoot*, 11 Mod. 238. *Count of Arran v. Crisp*, 12 Mod. 54. S. C. *Holt*, 549. *Bradbury v. Wright*, Dougl. 624. *Cranstoun v. Clarke*, Sayer, 78. See *Davenant v. Bishop of Salisbury*, 1 Ventr. 223. *Marchioness of Blandford v. Duchess of Marlborough*, 2 Atk. 544, and *Bishop of Oxford v. Wise*, cited *ibid.* *Amfield v. White*, Ryan. & Moo. 246.

a *net* rent, that means a rent clear of all those deductions to which the rent might otherwise be liable. (*n*)

Covenant to pay rates and taxes.

If the tenant agree to pay all rates, taxes, scots, &c., whether parochial or parliamentary, then or thereafter charged or chargeable, in respect of the land demised, an extraordinary assessment by the commissioners of sewers for the permanent benefit of the land will be within the agreement. (*o*)

Sewers' case.

The sewers' rate is also a landlord's tax under the statute of the 23 Hen. VIII. c. 5; by the 3 & 4 Wm. IV. c. 22, sec. 18, the sewers' rate may be apportioned between the incoming and outgoing tenant, and also in the case of a vacant tenement.

IV. Covenant to insure against fire :

IV. A covenant in the lease of a house, "to insure and keep insured a given sum of money upon the premises during the term in some sufficient insurance office," is not void for uncertainty; but means that the premises shall be insured against fire, in some office where insurances against fire are usually effected. (*p*)

What breach of.

Where there was such a covenant in a lease on the part of the tenant, and he effected an annual policy on the premises with an Insurance Company in the usual printed form, by which it is declared, that the policy shall be for such longer period as the tenant shall regularly pay, and the company receive the premium; and a space of fifteen days beyond the quarter days is given for payment of the premium, during which time the company is liable; the year expired on the 25th of March, 1811, but the tenant did not pay the premium for a renewal till the 25th of April following, and the company then gave a receipt for the premium, stating the insurance to be from Lady-day, 1811, to Lady-day, 1812;

(*n*) Bennett v. Womack, 7 B. & W. 312.
C. 627.

(*p*) Doe dem. Pitt v. Shewin, 3
(*o*) Waller v. Andrews, 3 Mees. Camp. 135.

the Court held that the covenant was broken by reason of the non-payment of the premium on or before the 9th of April and that the lease was forfeited upon a clause of re-entry. (*q*)

But where a lessee covenanted to insure and keep insured a specified sum of money upon the premises; and accordingly effected such an insurance for a definite time; and the policy contained a memorandum that, in case of the death of the assured, the policy might be continued to his personal representative, provided an indorsement to that effect were made upon it within three months after his death: and the lessee having died, the indorsement continuing the policy to his personal representative, was not made till *after the expiration* of three months from the time of his decease. The Court held, that, under these circumstances, there was no breach of the covenant to keep the premises insured. (*r*)

If the tenant covenant to keep the premises in repair, and also to insure them for a specific sum against fire;—on their being burned down, his liability on the former covenant is not limited to the amount of the sum to be insured under the latter. (*s*)

Whether a covenant to insure be generally a covenant which runs with the land, is a question still undecided. Supposing the lease to contain a covenant that the lessee shall insure, *and in case of fire pay over the insurance money to the lessor*, there seems little doubt but such a covenant, giving a double security to the lessor for the rebuilding of the house, must be taken as falling within the definition of a covenant running with the land. But upon the bare covenant to insure, the law presents to the landlord no means of recovering from the tenant the money he may receive from the insurance

Whether running with the land.

(*q*) Doe dem. Pitt v. Shewin, 3 Camp. 135.

pressed a doubt in this case as to the validity of such a proviso.

(*r*) Doe dem. Pitt v. Laming, 4 Camp. 73. Lord Ellenborough ex-

(*s*) Digby v. Atkinson, 4 Camp. 275.

office, whatever equity might do between the parties. In the Building Act (*t*), however, the office is enjoined, at the request of the lessor, to lay out the money due upon the lessee's insurance, in rebuilding the house, if within the bills of mortality : so that, in these districts, the landlord may at once have the benefit of the tenant's insurance. It has been accordingly held, that when the premises are within the bills of mortality mentioned in that act, a covenant to insure runs with the land. (*u*)

Whether the covenant to insure runs with the land or not, the lessor may, on non-performance of it, enter as for breach of *condition*, and oust the assignee of the lessee, even although the lessor has distrained for rent, with knowledge of the breach of covenant, which was a waiver of the breach of condition up to the time of the distress. But the subsequent non-insurance was a continuing breach between the time of the distress and gave a right of entry for the forfeiture, (*v*) and a court of equity will not relieve a tenant, against whom the landlord is proceeding to recover the demised premises for breach of the covenant to insure. (*w*)

But if the lessor by his own conduct induces the lessee to think he is doing all which is required of him by the lease, retaining the lease in his own hands, and furnishing an imperfect abstract of it, he will not be entitled to recover for breach of the covenant. (*x*)

V. Not to assign or underlet.

V. A covenant not to aliene, either by way of assignment or underlease, without the licence of the lessor, (*y*) is a covenant on the part of the lessee very frequently inserted

(*t*) 14 Geo. c. 78. sec. 83.

(*u*) *Vernon v. Smith*, 5 B. & A. 1. And see *Platt on Covenants*, p. 183.

(*v*) *Doe dem. Flower v. Peck*, 1 B. & Ad. 428.

(*w*) *Green v. Bridges*, 4 Sim. 96. *Thompson v. Guyon*, 5 Sim. 65.

(*x*) *Doe dem. Knight v. Rowe*,

Ryan. & Moo. 343.

(*y*) The vendor of a lease containing such a covenant, and not the vendee, is bound to obtain the lessor's licence. *Lloyd v. Crisp*, 5 Taunt. 249. See *Mason v. Corder*, 2 Marsh. 33. S. C. 7 Taunt. 9.

in leases. But its insertion cannot be enforced as a usual covenant. (y)

A court of equity will not relieve against a forfeiture for alienation without licence. (x)

A distinction must be taken between a proviso for making the lease void in case of assignment without licence, which is the nature of a condition and a *covenant* not to assign without license. Mr. Justice *Holroyd* remarked, in the case of *Paul v. Nurse* (a), the general principle is, that the lessee may assign his interest in the term. But the lessor may restrain the lessee from assigning by proviso or covenant; if he grants the term subject to a condition, that it shall cease if the lessee assign, the assignment by the lessee will be void. But if the lessor in this case restrains the lessee by covenant only, the latter by assignment commits a breach of the covenant, but the assignment is not void.

A covenant or proviso against alienation will receive a very strict and narrow construction from the Courts. (b) According to one case, a covenant by the lessee, his executors, administrators, or *assigns*, not to *assign* generally, was holden void, because it was repugnant upon the face of it. (c) But the authority of this case is not now recognized; because there may be assigns *at law*, as well as by act of the party; and an assignment at law stands upon a different ground. (d)

A covenant not to *assign*, transfer, or set over, or otherwise do, or put away the lease or premises, will not be broken by the lessee's *underletting* the premises. (e) But where the

Underlease.

(y) *Henderson v. Hay*, 3 B. C. C. 632. *Church v. Brown*, 15 Ves. 258.

(x) *Hill v. Barclay*, 18 Ves. 56. *Wafer v. Mocato*, 9 Mod. 112.

(a) 9 B. & C. 488.

(b) Bl. Rep. 767. *Church v. Brown*, 15 Ves. 265.

(c) Bac. Abr. *Grants*, (I).

(d) *Weatheral v. Geering*, 12 Ves. 504.

(e) *Crusoe dem. Blencowe v. Bugby*, Bl. Rep. 766. S. C. 3 Wils. 234. *Kinnersley v. Orpe*, Doug.

56. *Church v. Brown*, *sup.*

condition was not to *set, let, or assign* over the said messuage or any part thereof, a lease which fell short of the term by one day was held a breach. (e) And a covenant not to let, set, or demise the premises, or any part, for *all* or any of the term, restrains an assignment. (f)

Where the proviso in the lease was, that "if the lessee, his executors, or administrators, did or should assign, or otherwise part with this indenture of lease, or the premises thereby demised, or any part thereof *for the whole or any part of the term thereby granted*, to any person or persons whomsoever, without the licence and consent in writing of the lessor first had and obtained for that purpose, the lessor might re-enter," &c.—and the lessee entered into an agreement with J. S. to grant him a lease of the premises for the residue of the term, reserving a few days, under which possession was given; Lord *Ellenborough*, C. J., held that the words of the proviso included an underlease, and that consequently an underlease was a breach of the proviso. (g)

Where a lease contained a proviso for re-entry in case the tenant should demise, lease, grant, or let the demised premises, or any part or parcel thereof, or convey, &c., to any person whatsoever, for all or any part of the term, without the license of the lessor; and the lessee without such licence agreed with a stranger to enter into partnership with him, and that he should have the use of the back-chamber, and some other parts of the premises *exclusively*, and the rest jointly with the lessee; and he was accordingly let into possession, the Court held this to be a breach of the proviso, whether the possession were given gratuitously, or for rent. (h)

Lodgers.

But a covenant not to underlet any part of the premises

(e) *Roe dem. Gregson v. Harrison*, 2 T. R. 425.

(f) *Greenaway v. Adams*, 12 Ves. 395.

(g) *Doe dem. Holland v. Worley*, 1 Camp. 20.

(h) *Roe dem. Dingley v. Sales*, 1 M. & S. 297.

is not broken by taking in a lodger. Therefore, where a covenant was in these words, “that the said W. L., his executors or administrators, shall not, nor will at any time or times hereafter during the continuance of the term, grant any underlease or leases for any term or terms whatsoever, or let, assign, transfer, set over, or otherwise part with the said messuage or tenement and premises, or his or their term or interest by the said indenture granted, or intended so to be, or any part thereof, without the special license, assent, and approbation of the said S. P., his heirs or assigns, under his or their hands in writing, first obtained ;”—and the lessee admitted a lodger for above a twelvemonth into the exclusive possession of a room ; it being contended that this was a breach of the covenant, Lord *Ellenborough*, C. J., said, “The covenant can only extend to such underletting as a licence might be expected to be applied for ;—and whoever heard of a licence from a landlord to take in a lodger ?” (i)

If the lease contain a condition that the lessee “shall not *parcel* out the land, or any part thereof, from the house, and the lessee lease the house and part of the land to A. and the residue of the land to C.,” this is a breach of the condition ; for the word *parcel* signifying the separation of the land from the house, if the first letting were not a breach, the second would clearly be so. (k)

Permitting persons to use portions of the land for raising potatoes is a breach of a stipulation not to suffer any part to be occupied by any other person, without consent, although proved to be the custom of the country to pursue that course. (l)

Depositing a lease as a security for money is no breach of a covenant or proviso not to assign, (m) even though the

Equitable deposit.

(i) Doe dem. Pitt v. Laming, 4 Camp. 77.

(k) Marsh v. Curteis, Moore, 425. S. C. 2 And. 42, 90.

(l) Greenslade v. Tapscott, 1 C., M. & R. 55.

(m) Doe dem. Goodbehere v. Bevan, 3 M. & S. 353.

covenant be “ not to let, set, assign, transfer, *or otherwise part with* the premises thereby assigned, or that present *indenture of lease* ; (n) nor can the mere act of advertising the demised premises for sale be construed into a breach of such a covenant. (o)

Equitable estate.

If a lease be made to A. in trust for B., with a proviso against assigning without licence, an assignment by B. of his equitable interest, will not, it is conceived, amount to a breach of the condition, although he direct that A. shall stand possessed in trust for the assignee.

Demise.

A question has been raised, whether, if a lessee covenant with the lessor not to assign over his term without the lessor's consent in writing; and afterwards, without such consent, devise the term to J. S., this is not a breach of the covenant, and such seems to have been decided in two early cases. (p) The contrary, however, appears to be the better opinion, and it was so decided in *Fox v. Swann*, (q) and the law of that case has been considered as clearly established in two recent cases. (r) But the devisee must take, subject to the condition, in like manner as an executor would, if named.

Executors, &c.

If lessee for years covenant not to assign his lease, *so as it may come to J. S.*, and he assign it to J. D., this is a breach of the covenant, for the possibility that through J. D. it may come to J. S. (s)

The personal representatives will be bound, if named in

(n) Doe dem. *Pitt v. Hogg*, 4 D. & R. 226. S. C. 1 Ryan & M. 36.

(o) *Gourlay v. Duke of Somerset*, 1 Ves. & Bea. 73.

(p) *Berry v. Taunton*, Cro. Eliz. 331. *Dumper v. Syms*, 1 Rol. Abr. 429. l. 4. S. C. Cro. Eliz. 816. Lord Coke, in his report of this case, (4 Rep. 119,) is silent upon

this point.

(q) *Fox v. Swann*, Style, 482.

(r) See 3 Wils. 237. 3 M. & S. 361.

(s) *Cumin v. Richardson*, 1 Rol. Abr. 429. l. 14. *Quære*, if the assignment be guarded by a like covenant, that J. D. shall not assign so as it may come to J. S.

the proviso or covenant against alienation, as where a lease contains a proviso that the lessee, *his executors or administrators*, shall not aliene without licence in writing, a *voluntary* assignment by the executors or administrators, without such licence, is a breach of the proviso. (t) And if the lessee covenant that he, *his executors or administrators*, shall not assign, (without licence,) except by his or their last will and testament, and the lessee make his will and die, it seems that the executors will be bound by the covenant, and cannot sell the premises for the payment of debts without the licence of the lessor. (u)

But if personal representatives are not named in the proviso, they will be warranted in disposing of a lease as assets of the testator, notwithstanding the proviso against alienation by the lessee. Lord *Thurlow*, C., said, "If A. lets a farm to B. with a covenant not to alien, and B. dies,—may not his executors dispose of the term? I think it has been determined that they may, and I have always taken it to be clear law. It is an alienation by the act of God. I remember Lord *Camden* entered into the question much in the same way. He took it to be a clear law, that an alienation by death could not be a forfeiture. In the case of a lease for years to A. it goes to his executors, not by way of limitation, as in the case of remainders, over, &c.; but it goes to them as coming in the place of the lessee. I understood it to be well settled, as I have stated. But I do not mean to lay it down, that a man may not by a clause in his lease provide, that in case of a devolution to executors, it shall not be alienable by them: but it must be very special for that purpose." (v)

In a case in which a bill was filed against executors, averring that their testator had entered into an agreement to take a renewed lease, which was to contain a proviso

(t) *Roe dem. Gregson v. Harrison*, 2 T. R. 425. And see *Doe dem. Goodbehere v. Bevan*, 3 M. & S. 353.

(u) *Lloyd v. Crispe*, 5 Taunt. 249.

(v) *Seers v. Hind*, 1 Ves. jun. 295.

against assignment by the *lessee* without the lessor's consent, and an offer by the plaintiff to permit the covenants, which should be entered into on the executor's part, to be so qualified as that the defendants might be no further liable thereon than they would have been on the covenants which ought to have been entered into by the testator, in case a proper lease had been entered into in his lifetime; and the defendants, in their answers, objected it would be impossible so to frame the covenants, it was referred to the Master to settle the form of the lease, but the suit was compromised between the parties. (*w*)

not broken by
assignment in
law,

An assignment either by the lessee, or his executor *not voluntary*, but by mere *act of law*, is not a breach of the covenant not to assign. (*x*)

as by execu-
tion,

Where, therefore, a lessee who had so covenanted, gave a warrant of attorney to confess a judgment, on which the lease was taken in execution and sold, it was holden to be no breach of the covenant. (*y*) But such execution must be *bond fide*;—for if the tenant give a warrant of attorney to a creditor *for the express purpose of enabling such creditor to take the lease in execution*, this will be a fraud and a breach of the covenant; and under a clause for re-entry for breach of covenant, the lessor may recover the premises in ejectment from a purchaser under the sheriff's sale. (*z*)

bankruptcy.

So if the lessee become bankrupt, a *bond fide* assignment under such bankruptcy, is held to be no breach of a condition not to assign. (*a*)

The assignees under the commission will not be bound by such condition. (*b*) Therefore where a lease containing such

(*w*) Phillips *v.* Everard, 5 Sim. 102.

(*x*) Weatherall *v.* Geering, *supra*.

(*y*) Doe dem. Mitchinson *v.* Carter, 8 T.R. 57.

(*z*) Doe dem. Mitchinson *v.* Carter, *sup.* p. 64.

(*a*) Goring *v.* Warner, 2 Eq. Ca. Abr. 100. 7 Vin. Abr. 85. pl. 9.

Weatherall *v.* Geering, *supra*.

(*b*) Philpot *v.* Hoare, Amb. 480.
Doe dem. Goodbehare *v.* Bevan, 3 M. & S. 353.

a covenant (in which assigns were named,) was deposited by the lessee as a security for money, and, the lessee becoming bankrupt, was sold by the direction of the Chancellor to pay the debt, the Court of King's Bench held that the assignees under the commission might assign the lease to the vendee without the consent of the lessor. (c)

And where a lease contained a proviso for re-entry, and that the lease should be void, on the lessee's assigning without the licence of the lessor; 'the lessee in January, 1825, executed a deed which purported to convey all his real and personal property to trustees for the benefit of his creditors; and in April, 1825, a commission of bankruptcy issued against the lessee, and he was declared bankrupt: it was held that the deed of January, 1825, being itself an act of bankruptcy and void, did not operate as a valid assignment, of the tenant's interest in the lease, and therefore, there was no forfeiture; but that from the moment the bankrupt executed it, his interest vested in the assignees under the commission, not by virtue of the deed, but by operation of law, and by force of the bankrupt laws. (d)

A. granted a lease to B. containing a covenant that B., his executors or administrators, without mentioning "*assigns*," should not underlet without the consent of the lessor, and B. became bankrupt, and his assignees assigned the premises to C.; and afterwards B. obtained his certificate, upon which C. re-assigned the premises to B., and he underlet them to D.; it was held that B. having been discharged at the time of his bankruptcy from all the covenants of his lease, (e) the underletting by him, which was in the character of assignee, was no breach of the covenant. (f)

(c) Doe dem. *Goodbehere v. Bevan*, *supra*. *Vide* 2 Atk. 219, note.

(d) Doe dem. *Lloyd v. Powell*, 5 B. & C. 308.

(e) By the statute 49 Geo. III. c. 121, s. 19.

(f) Doe dem. *Cheere v. Smith*, 1 Marsh. 359. S. C. 5 Taunt. 795.

Proviso against
bankruptcy,
&c.

The landlord may, however, always guard against such assignment by the particular provisions in his lease; it having been decided that a proviso in a lease for years, that the landlord shall re-enter upon the tenant's committing any act of bankruptcy whereon a commission shall issue, is good. (*g*) Accordingly, where one leased for twenty-one years, if the lessee, his executors, &c., should so long continue to occupy the farm, &c., and not to let, set, assign over, or otherwise depart with the lease, and the tenant having become bankrupt, his assignees sold the lease, it was determined that the term was *ended* by the bankrupt's quitting the occupation. (*h*) And if the proviso be for determining the lease after bankruptcy of the lessee, his executors, administrators, or assigns, and the lessee bequeath the lease to his executors upon trust, the lease will become void on the bankruptcy of the surviving executor. (*i*)

The estate of the tenant, held under a condition to keep it in his own possession, will determine upon the premises being taken under an execution so as to put an end to his occupation. (*k*)

And where a lease contained a clause of re-entry, in case the term of years thereby granted should be *extended or taken in* execution, and before the end of the term the sheriff entered the premises under a writ of extent against the lessee at the suit of the Crown, and held an inquisition and seized the lessee's interest into the king's hands; the Court of Exchequer adjudged that this proceeding was *a taking in execution* within the latter clause of the condition,

(*g*) *Roe dem. Hunter v. Galliers*, 2 T. R. 133. This rule does not apply to mere chattels. If timber be sold to a trader with a proviso that in case of the vendee's bankruptcy, the vendor may retake it, the condition is void under the 21 Jac. I. c. 18, s. 11, if the bankrupt have the disposition of the goods. *Hol-*

royd v. Gwynne, 2 Taunt. 176.

(*h*) *Doe dem. Lockwood v. Clarke*, 8 East, 185.

(*i*) *Doe dem. Bridgman v. Davis*, 1 C., M. & R. 405. *Doe dem. Williams v. Davies*, 6 C. & P. 614.

(*k*) *Doe dem. Duke of Norfolk v. Hawke*, 2 East, 481.

and that the term was thereby determined and forfeited to the lessor. (*l*)

If a lease for years be made to a *feme* sole with a condition against alienation, and she take husband, this is no breach of the condition. (*m*) But if a lease be made to husband and wife, upon condition that if it come to any other hand than their own and their issue's the lessor may re-enter; and the husband die, and the wife take another husband, the lessor will, it seems, have a right to re-enter for condition broken. (*n*)

A distinction between a condition and covenant against assignment has been already stated. A further distinction must be noticed, which is, that if, under a condition not to aliene without license, *such* license is once given, though to a particular individual, (*o*) the condition is wholly discharged; (*p*) but although the condition for re-entry is gone, the lessee may be still liable on his covenant. (*q*)

The license must be given in terms conformably to the condition. If, therefore, the consent is required to be in writing, a parol license will not prevent the future operation of the condition, (*r*) nor will a dispensation with the forfeiture for a breach of condition take away the right of entry for a subsequent breach. (*s*)

The president and scholars of *Corpus Christi* college in *Oxford* made a lease for years with a proviso, that the lessee or his assigns should not aliene the premises to any

(*l*) *Rex v. Topping*, M'Clel. & Y. 544. 2 Man. & Ryl. 525. Platt on Covenants, 426.

(*m*) Anon. Moore, 21.

(*n*) *Ibid.* Com. Dig. Condition (Q).

(*o*) *Brummell v. M'Pherson*, 14 Ves. 173.

(*p*) *Dumpor's case*, 4 Co. 119, *et vide* *Brummell v. M'Pherson*, *supra*.

(*q*) *Paul v. Nurse*, 8 B. & C. 486.

(*r*) *Macher v. Foundling Hospital*, 1 Ves. & Bea. 191. *Roe dem. Gregson v. Harrison*, 2 T. R. 425. *Richardson v. Evans*, 3 Mad. 218. (*s*) *Doe dem. Boscawen v. Bliss*, 4 Taunt. 735. *Fryett v. Jeffreys*, 1 Esp. 393. *Doe dem. Sore v Ekins*, Ry. & Moo. 29.

person without the special license of the lessors. The lessors afterwards gave such license to the lessee to aliene all, or any part of the land to any person whatsoever. The lessee assigned all his interest to T., who devised the same to his son, who dying intestate, administration was granted to A., who assigned the term to B. The lessors hereupon entered for condition broken. It was determined that by the first license the condition was satisfied, and that the lessors, having licensed the original lessee, and thereby dispensed with one alienation, had dispensed with all subsequent alienations; and that the estate of T., being absolute, it was impossible that his assignee should be subject to the condition. (*q*)

If a lease be upon condition that the lessee shall not aliene the land without license, and the lessor license him to aliene *part*, he may afterwards aliene the rest without further license. (*r*)

So if A. lease land to three, upon condition that neither they nor any one of them, shall aliene without license, and then the lessor license one, this discharges the condition as to all. (*s*)

In a case in *Dyer*, (*t*) a lease was made with a proviso that the lessee, his executors and assigns, should not aliene without license to any, except his wife or child; the Court was divided in opinion, whether the wife or child might aliene without license. In *Brummell v. M'Pherson*, (*u*) Lord *Eldon* considered the case as deciding that the condition was gone, and it is so stated in *Dumpor's* case. In a subsequent case, where a lease for years was made with a proviso by the lessee, not to aliene without

(*q*) *Dumpor's* case, *supra*. S. C. *Dumper v. Symms*, Cro. Eliz. 815. S. P. *Walker v. Ballamy*, Cro. Jac. 102. S. C. 1 Rol. Abr. 471. l. 33.

(*r*) See 16 Eliz. *Dyer*, 334 b. pl. 32, in which the contrary appears to have been held, but which was

denied to be law by Popham. C. J., in *Dumpor's* case.

(*s*) *Leeds v. Crompton*, 1 Rol. Abr. 472. l. 7. *Dumpor's* case, *supra*.

(*t*) Anon. *Dyer*, 152. a. pl. 7.

(*u*) 14 Ves. 176, *et vide* 4 Co. 120.

license to any but his wife, or his brother, and the lessee aliened to his brother, living his wife, and the brother assigned his term to A.; it was decided, that the condition being once fulfilled was afterwards dispensed with; and consequently that the brother might aliene to whom he chose without license. (v)

Whether the license to assign be general, or particular, "as to one particular person," the condition is gone, and the assignee may assign without license, as before mentioned. (w)

Where the lessor, during the term, entered into part of the land let, and then the lessee assigned over his term in the residue of the land without the consent of the lessor, there being a covenant not to assign without such license, upon which the lessor sued; it was made a question whether the action would lie, inasmuch as the lessor had entered into part of the land. But *Rolle*, C. J., held that the covenant was collateral: and was, therefore, broken by the assignment, notwithstanding the lessor's entry into part of the land. (x)

A covenant not to assign cannot run with the land; the action being founded on privity of estate, the liability of the assignee ceases by his assignment, by which the privity of estate is destroyed, but the lessee may still continue liable. (y) A covenant by the lessee, not to *underlet*, may, however, be binding on the assign, if named in the covenant. (z)

VI. The lessee sometimes further binds himself and *his assigns* to reside upon the premises. This will be broken by the lessee's doing any act whereby his residence may be

VI. Covenant to reside on the premises,

(v) *Whitchcot v. Fox*, Cro. Jac. 298.

(w) *Brummell v. M'Pherson*, 14 Ves. 173.

(x) *Collins v. Sillye*, Style, 265.

(y) *Paul v. Nurse*, *supra*. See *vide Bally v. Wells*, 3 Wils. 33, *contrà*.

(z) *Vide Doe dem. Cheere v. Smith*, 1 Marsh. 359. S. C. 5 Taunt. 795.

or to do suit
at the land-
lord's mill.

come impossible ; as by suffering the premises to be taken and sold under an execution, (a) and this is a covenant running with the land; (b) as is also a covenant to do suit to the mill of the lessor, his heirs, and assigns, by grinding all such corn there as should grow upon the demised premises. (c)

VII. Covenant
not to exercise
particular
trades.

VII. Another covenant not unfrequently inserted upon the part of the lessee is, that the lessee shall not himself carry on particular trades upon the premises ; nor assign them to persons carrying on such trades. Such a covenant runs with the land. (d)

If the lessee covenant that he will not let the shop, yard, or other thing belonging to the house, to any one who shall sell coals, and will not himself sell coals there, and then he let the *whole* house to one who sells coals, this is a breach of the covenant. (e)

Schoolmaster.

Where a lessee of a house and garden covenanted not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, any trade or business whatsoever, without the license of the lessor; and afterwards without license he assigned the lease to a *schoolmaster*, who carried on his business on the premises; the Court held that the schoolmaster's was a business within the covenant, and that the lessor was entitled to re-enter under a proviso for re-entry for non-performance of covenants. (f)

Lunatic
asylum.

The keeping of a lunatic asylum is, it seems, not within the definition of a *trade*, and therefore is not a breach of a

(a) *Vide* Doe dem. Duke of Norfolk v. Hawke, 2 East, 481.

(b) Spencer's case, 5 Rep. 16. a. Tatem v. Chaplin, 2 H. Bl. 133.

(c) Vyvyan v. Arthur, 1 B. & C. 410.

(d) See Mayor, &c. of Congleton v. Pattison, 10 East, 136.

(e) Chinsley v. Langley, 1 Rol. Abr. 427. l. 35.

(f) Doe dem. Bish v. Keeling, 1 M. & S 95.

covenant not to carry on any offensive *trade*; whether it would be within the prohibition to carry on an offensive *business*, appears doubtful. (g) A covenant not to carry on the business of a common brewer, or retailer of beer, is not broken by carrying on the business of a retail brewer. (h) But a covenant not to carry on the trade of a butcher, is broken by selling raw meat, although no animals are slaughtered on the premises. (i)

Retail brewer.

Butcher.

Where the lessee covenanted that he would not do any act upon the demised premises, which might be to the damage, annoyance, or disturbance of the lessor, or any of his tenants, or to any part of the neighbourhood; and the proviso for re-entry was, that the lessee should not permit any person to inhabit the premises who should carry on certain specified trades or businesses, (that of a licensed victualler *not* being one of those,) or any other business that might be offensive, or any annoyance or disturbance to any of the lessor's tenants: the Court of King's Bench certified, that the opening of a public-house upon the premises was not a breach of the covenant or proviso; it not being stated in the case, sent by the Master of the Rolls for the opinion of the Court, that the public-house was an annoyance to the tenants or likely to become so. (k)

Public house.

A covenant to permit the landlord to view the premises at convenient times, is not broken by refusing him permission to see some of the rooms, if he had not given previous notice of his coming. (l)

If the lessee covenant not to carry on a particular trade without the consent of the lessor in writing, the mere fact of the lessor's suffering the tenant to carry on one trade in the

(g) Doe dem. Wetherell v. Bird,
6 C. & P. 201. 2 Ad. & Ell. 161.
4 Nev. & M. 285.

1 B. & Ald. 617.

(k) Jones v. Thorne, 1 B. & C.
715.

(h) Simons and another v. Far-
ren, 1 Bing. 126. N. S. *ibid*, 272.

(l) Doe dem. Wetherell v. Bird,
supra.

(i) Doe dem. Gaskell v. Spry,

premises will not afterwards authorize his carrying on another without a written licence. (*m*)

Negative covenant.

If a covenant be negative, as not to erect or alter buildings without consent, and the proviso for re-entry be on default *in performance* of any of the covenants after thirty days' notice, a breach of the negative covenant will not fall within the proviso, which is confined to the *non-performance* of acts by the lessee. (*n*)

Condition for re-entry upon breach of covenant.

In aid of the covenants, a condition is usually inserted in the lease for the re-entry of the lessor in case any of them be broken. (*o*)

The proviso for re-entry will be void if reserved to a stranger. (*p*)

A proviso giving a power of re-entry, if the tenant shall *do* any act contrary to the covenants, does not apply to a breach of covenant to repair; the omission to repair not being an act done within the proviso. (*q*)

(*m*) *Macher v. Foundling Hospital*, 1 Ves. & Bea. 188.

(*n*) *Doe dem. Palk v. Marchetti*, 1 B. & Ad. 715.

(*o*) *Shep. Touch.* 124, and *n.* (2), and see *post*, Book III. Chap. 1, of dissolving the tenancy by forfeiture. Other cases might be added to these, which are of a perfectly miscellaneous nature; and in considering which the courts have been merely called upon to interpret between the parties, instead of laying down any principle of law. The reader who is entangled in a covenant so unintelligibly or doubtfully worded, that he is compelled to have recourse to the Courts for the interpretation of ill-drawn instruments, may find assistance by consulting the cases of *Clifton v.*

Walmesley, 5 T. R. 564. *Gerard v. Clifton*, 7 T. R. 676, reversing the judgment of C. P. in 1 B. & P. 524. *Coker v. Guy*, 2 B. & P. 565. *Love v. Pares*, 13 East, 80. *Goodtitle dem. Luxmore v. Saville*, 16 East, 87. *Collison v. Lettsom*, 2 Marsh, 1. S. C. 6 Taunt. 224. *Doe dem. Lady Wilson v. Abel*, 2 M. & S. 541. *Doe dem. Spencer v. Godwin*, 4 M. & S. 265. *Colton v. Lingham*, 1 Stark. 39. *Earl of Shrewsbury v. Gould*, 2 B. & A. 487. *Doe dem. Rudd v. Golding*, 6 Moore, 231. *Charlton v. Driver*, 2 B. & B. 345.

(*p*) *Doe dem. Barker v. Lawrence*, 4 Taunt. 23.

(*q*) *Doe dem. Abdy v. Spencer*, 3 B. & Ad. 299.

A penalty annexed to a covenant, will not prevent the condition for re-entry applying, if the words are large enough. (r)

But without contemplating the breach of covenants, and the consequently premature determination of the tenant's interest, the law enjoins the quiet and peaceable yielding up of the possession of the premises upon the expiration of the estate or term for which they are held. The remedies of the landlord in case of neglect on the part of the tenant to comply with this obligation, and the penalties which the law affixes to such neglect, remain to be hereafter considered.

Tenant bound to yield up possession at the expiration of his term.

(r) Doe dem. Antrobus v. Jepson, 3 B. & Ad. 402.

CHAPTER THE THIRD.

Of the Rights and Liabilities of Landlord and Tenant in respect of Third Persons.

I. Landlord's rights.

I. 1. **T**HE landlord, having parted with the possession of the premises to his tenant, retains a right, against *him*, to use all ways appurtenant thereto, in order to view waste, or to demand rent, or to remove an obstruction ; (a) and if in the lease there is a grant of all ways to the lessee without any exception, and the lessee covenant to contribute with the other occupiers of lessor's lands, to the keeping up of paths used by them in common, and it is proved the lessor always used a particular path, to which alone the covenant of the lessee can apply, it may be inferred the lessee took the soil, subject to the lessor's right of way. (b)

His rights against strangers are in respect of his reversion only. For any act whereby his reversion is injured, he may recover against the wrong doer ; as if a stranger stop up a rivulet, whereby the timber on the estate becomes rotten ; or erect a wall, whereby the lights of the mansion-house are obstructed. (c) Nor will the acquiescence of the tenant in the act of a stranger be binding upon the landlord when he regains possession, unless estopped by actual enactment. As if tenant for years suffered windows newly opened by his neighbour to remain unobstructed for more than twenty years, and so to become ancient lights, the landlord, at the expiration of the term, was not bound thereby, unless he had

(a) Proud v. Hollis, 1 B. & C. 8. (c) 2 Rol. Abr. 551. l. 46. Bid-
 (b) Oakley v. Adamson, 8 Bing. dlesford v. Onslow, 3 Lev. 209.
 356. 1 Moo. & Sc. 510, *et vide* Jesser v. Gifford, Burr. 214.
supra.

previous knowledge of the fact; but might treat the lights as if they had been newly opened. (d) By the 3 & 4 Wm. IV. c. 71, s. 3, however, it is now enacted, that when the use of lights in any dwelling-house, &c., shall have been actually enjoyed for twenty years, the right therein shall be deemed absolute.

2. The landlord having resigned the occupation, all his liabilities in respect of possession are thereby suspended. 2. *Liabilities.* If, therefore, a stranger be injured by the ruinous state of the premises, the landlord cannot be called upon to answer for the injury; and if the fences be suffered to fall into decay, whereby a stranger's cattle stray and are injured or lost, the landlord is not responsible. (e)

But in some cases the landlord, by his own act and agreement, may render himself liable to answer for injuries, for which his tenant would otherwise alone be answerable. Therefore, where the plaintiff had sustained an injury by his foot slipping through a hole in the pavement of a house out of repair, and thereupon brought an action against the landlord as owner, and it appeared upon the trial that the landlord was bound to repair, and had actually commenced the repairs, the Court of Common Pleas held, that though the occupier was *prima facie* bound to repair, and therefore liable, yet if it could be shown that the landlord had undertaken to repair, the landlord would be liable for the consequences of a neglect to repair. (f) So case lies against the landlord of a house, demised by lease, who is under a contract with his tenant to repair, where the workmen so negligently conduct themselves as to occasion an injury to a third person. (g)

If the landlord lets premises with a nuisance on them, and afterwards receives rent, he is liable for the continuance of

(d) *Daniel v. North*, 11 East, 372. 350.

(e) *Cheetham v. Hampson*, 4 T. R. 318.

(g) *Leslie v. Pounds*, 4 Taunt. 649.

(f) *Payne v. Rogers*, 2 H. Bl.

the nuisance ; but if the landlord lets the premises without a nuisance, and the tenant causes a nuisance, the landlord is not liable, unless he renews the tenancy with the nuisance on the premises. (*h*)

1. Tenant's rights.

II. 1. The tenant, upon his entering upon that character, is invested with all the rights incident to possession ; and may consequently maintain an action against any person who may be guilty of an act whereby his possession is encroached upon or injured ; as for an immediate trespass upon his lands, or for an injury consequent upon the erection of a nuisance ; and even after the expiration of his term he may recover damages for an injury sustained during its continuance. (*i*)

2. Liabilities.

2. The tenant as the occupier is *prima facie* liable to answer for a neglect in the repairs of highways, fences, &c. And where a man, who is bound to repair a bridge *ratione tenuræ*, leases the lands, his lessee will be bound, at the peril of an indictment, to repair the bridge ; it being always sufficient to charge a party for such repairs by the name of *occupier*. (*k*)

If tithes are commuted into a rent-charge payable by the person for the time being in possession or occupation, and the owner permits the rent-charge to be in arrear, and then lets the land, the tenant will be liable to a distress on his goods for the arrears. (*l*)

The occupier, and not the landlord, is liable to be rated for the repairs of the parish church, for poor's rates, and for all parliamentary and parochial taxes payable in respect

(*h*) *Rex v. Pedley*, 3 Nev. & M. 627.

(*i*) 2 Rol. Abr. 551. l. 46. *Symonds v. Seabourne*, Cro. Car. 325. *Biddlesford v. Onslow*, 3 Lev. 209. *Evelyn v. Raddish*, Holt's N. P. C. 543.

(*k*) *Regina v. Bucknall*, Lord

Raym. 792, 804. *Rider v. Smith*, 3 T. R. 766. *Cheetham v. Hampson*, 4 T. R. 318. *Whitfield v. Weedon*, 2 Chit. 685.

(*l*) *Newling v. Pearce*, 2 Dowl. & Ryl. 607. 1 B. & C. 437, *et vide* *Bendysh v. Pearce*, 4 Moore, 99.

of the premises, but not for land tax, or, in general, for sewers rate, without a special agreement to that effect, as before noticed. (m) If taxes are to be paid by the landlord, the tenant having paid them, may deduct them out of the rent due, but he should take care to make the deduction out of the rent of the then current year. (n)

By the 7 Geo. III, c. 37, lands embanked from the Thames were vested in the owners free from taxes. (o) By this enactment, such lands are freed from land tax imposed by 27 Geo. III., but not from house and window duties imposed by the 38 Geo. III. c. 40. (p)

(m) Anon. 4 Mod. 148. *Rex v. St. Luke's*, Burr. 1053. *Milward v. Caffin*, BL Rep. 1330. As to the land-tax and sewer-rate, *vide supra*, and see 57 Geo. III. c. 29, (Local and Pers.) as to cases in which the landlord may be rated for houses in the metropolis.

(n) *Andrews v. Hancock*, 1 B. & B. 37. *Stubbs v. Parson*, 3 B. & A. 516. *Spragg v. Hammond*, 4 Moore, 431. 2 B. & B. 59, *et vide infra*.

(o) *Williams v. Prichard*, 4 T. R. 2.

(p) *Perchard v. Heywood*, 8 T. R. 468.

CHAPTER THE FOURTH.

*Of the Rights and Liabilities of Landlord and Tenant
as affected by the Assignment or Death of the
Parties.*

An assignment is either in fact : **AN** assignment is either in fact, or in law. (a)

An assignment in fact is, where the party in whom the estate is vested voluntarily by deed or writing disposes of the *whole* estate to another person.

or in law ; viz.

An assignment in law is, where without such voluntary conveyance between the parties, the estate is, upon some particular event, transferred by act of law to a third person.

1. by marriage;

As, when a feme sole marries, her husband immediately acquires a right to the rents and profits of her freehold estates during *her* life ; and any estate she may possess less than freehold, together with all her personal chattels, will be absolutely vested in him, and remain in his disposal during *his* life ; (b) unless, as it seems, the husband is an alien. (c)

2. under an execution ;

And so when execution is issued against the lands of a man by *elegit*, statute, &c., the law vests the lands so seized in the judgment creditor ; and where a term is seized and sold under a *feri facias*, the vendee becomes the assignee thereof.

In case of bankruptcy, also, an assignment in law takes

(a) Co. Lit. 8. b.

(b) 2 Bl. Com. 433, and see Co. Lit. 351, n. (1).

(c) *Vide supra*, 70.

place. By the statute of the 1 & 2 Wm. IV. c. 56, a court of bankruptcy was established, consisting of a chief judge and three puisne judges, and six commissioners, to constitute a court of law and equity, and to have, (together with every judge and commissioner thereof,) the rights and privileges of a court of record; and the judges, or any three of them, are constituted a court of review, to have superintendence and control in all matters of bankruptcy, with power to determine all such matters in bankruptcy as, by petition or otherwise, had before been usually brought before the lord chancellor, whether such matters may have arisen in the court of bankruptcy or otherwise, except as thereafter provided, but subject to appeal to the lord chancellor on a special case, to be approved and certified by one of the judges.

In lieu of a commission of bankruptcy a fiat is directed to issue, and persons are to be appointed official assignees, one of whom is to be assignee of such bankrupt's estate, together with the assignee or assignees to be appointed by the creditors, and all the personal estate, and rents and proceeds of sale of real estate are to be received by the official assignee, and by him transferred or paid into the Bank of England, to the credit of the Accountant General of the Court of Chancery, and until the assignees are chosen by the creditors, the official assignee is for all purposes to be sole assignee. But such official assignee is in no respect to interfere with the creditors' assignees, in the appointment or removal of the solicitor, or in directing the time and manner of effecting any sales of the bankrupt's estate.

The act also provides that instead of the old mode of assignment, and bargain, and sale, the personal estate of the bankrupt, and all such estate as by the 6 Geo. IV. c. 16, was directed to be conveyed by the commissioners to the assignees, (thereby excluding copyholds, and the estates of tenants in tail,) shall vest in the assignees *virtute officii*, and that in register counties the certificate of the appointment of the assignees shall be registered, which shall have the

like effect as a registry of an actual conveyance would have had, but no purchaser, without notice of the bankruptcy duly registering his deed, is to be affected by such bankruptcy, unless the certificate is registered so far as regards the United Kingdom, within two months from the date of the appointment, and as regards all other places within twelve months from such date.

By the Bankrupt Act, 6 Geo. IV. c. 16, s. 75, any bankrupt entitled to any lease, *or agreement* for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained; and, if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor, or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid; and if the assignees shall not (upon being thereto required) elect whether they will accept or decline such lease, or agreement for a lease, the lessor or person so agreeing as aforesaid, or any person entitled under such lessor or person so agreeing, shall be entitled to apply by petition to the Lord Chancellor, who may order them so to elect and to deliver up such lease or agreement, (in case they shall decline the same,) and the possession of the premises, or may make such other order therein as he shall think fit.

There was a similar clause to the above in the previous act, 49 Geo. III. c. 121, s. 19, and it was holden not to extend to a parol agreement for a lease, (c) and to be confined to cases between the lessor and the lessee, or the assignee of the lease, and not to extend to cases between the lessee and his assignee; (d) and the same construction of law will, it seems, apply under the more recent statute of the 6 Geo. IV.

(c) *Ex parte Sutton*, 2 Rose, 86.

(d) *Taylor v. Young*, 3 B. & A. 521.

Until some act done by the assignees, or until the lease is surrendered by the lessee, it remains in him, and he will be liable to the payment of rent accruing subsequently to the bankruptcy. (e)

A surety in a lease will not be discharged by the bankruptcy of the lessee, and will be liable for breach of covenant between the date of the commission, or fiat, and the surrendering up of the lease by the lessee. (f)

The statute does not put an end to the lease, but only discharges the bankrupt, in case the lease is given up, from any subsequent payment of rent, or observance of covenants; and therefore, if the assignee of a lease becomes bankrupt, and delivers up the lease, the original lessee will not be discharged from his personal liability under his covenants, (g) and it is presumed that the lease will revest in him.

If the lease contains mutual covenants, such as an agreement on the part of the lessor to purchase the fixtures, at prices to be ascertained by valuers named by each party; it has been held that in such an instance, the delivering up of the lease by the lessee will release the lessor from his covenant, but without deciding the right to the fixtures. (h)

Where the assignees of a bankrupt advertised the lease of certain premises of which the bankrupt was lessee, without stating themselves in the advertisement to be the owners or possessors, and no bidding offering, they never took actual possession of the premises, the Court of King's Bench held, that the mere putting of them up to sale did not necessarily make them assigns, because it might be only an experiment to ascertain what their value was, and whether they would be beneficial to the common cause. (i)

or by exercising rights of ownership.

(e) *Copeland v. Stephens*, 1 B. & A. 593. and others, 3 B. & Ad. 211.

(f) 8 Taunt. 313. 2 Moore, 326, et (h) *Kearsey v. Carstairs*, 2 B. & Ad. 716.

vide *Manning and others v. Flight*, (i) *Turner v. Richardson*, 7 East, 335, et vide *Carter v. Warne*, 4 C.

supra. *Tuck v. Fyson*, 6 Bing. 321. & P. 191. 1 Moo. & M. 479.

(g) *Manning and others v. Flight*

So where the assignees of a bankrupt had allowed his effects to remain upon the premises occupied by him, for nearly a twelvemonth after the bankruptcy, and for the purpose of preventing a distress paid the arrears of rent due, at the same time *giving notice to the landlord that they did not intend to take the lease unless it could be advantageously disposed of*, and afterwards having put up the lease to auction, and finding no bidders, *never took actual possession of the premises*, though they kept the key for nearly four months afterwards, the landlord having never demanded it; Lord *Ellenborough*, C. J., held, that under these circumstances they had not made themselves assignees of the lease. (*k*)

And where the assignees released an under-tenant from all liabilities during the remainder of his term for rent, or in respect of the covenants contained in the underlease, the Court of Common Pleas held that this did not fix them with the original lease. (*l*)

On the other hand, where the lessee of pasture land became bankrupt, and his assignees suffered his cows to remain on the land for two days, *and ordered them to be milked there*, Lord *Ellenborough* was of opinion that this was an adoption of the lease by the assignees. (*m*)

So, where a bankrupt had a lease of premises, and also a reversionary interest in them, and the assignees sold *all his estate and reversionary interest* in the premises, his lordship held that the assignees must be considered as having accepted the lease. (*n*)

And in a case where the assignees put up the premises to auction, and *found a purchaser*, and received a deposit, but the contract of sale afterwards went off, without the assignees showing any reason why they did not enforce the sale.

(*k*) *Wheeler v. Bramah*, 3 Camp. 340, *et vide* *Scott, ex parte* 1 Rose, 446. n. *Hanson v. Stephenson*, 1 B. & A. 303.

(*l*) *Hill v. Dobie*, 8 Taunt. 325.

(*m*) *Welch v. Myers*, 4 Camp. 368.

(*n*) *Page v. Godden*, 2 Stark. 309.

It was held that they were liable to the payment of rent, as assignees of the estate and interest of the bankrupt in the premises. (o)

So intermeddling with and assuming the management of a farm of the bankrupt's, was held to fix his assignees with the consequences of mismanagement. (p)

And where the assignees *took actual possession* of leasehold premises, in which were goods of the bankrupt, but delivered them up as soon as the goods were sold, the Court of King's Bench held that the fact of taking possession distinguished the case from *Turner v. Richardson*, and *Wheeler v. Bramah*; for there is no statute which authorizes assignees of a bankrupt to keep possession of premises without paying any rent. (q)

In covenant by the landlord against the assignees for rent, the latter may plead, first, that the term did not vest in them; and (to avoid the effect of the 1 & 2 Wm. IV. c. 56, s. 26, which vests in the assignees the estate of the bankrupt without conveyance or assignment,) they may also plead that they abandoned, declined, and refused to accept it, and therefore were not liable. (r)

Even though the assignee, in words or in writing, declare his intention to refuse the estate, yet if in fact he takes advantage of it, he is not relieved from the charges incident to it. Thus, where the assignee of a bankrupt lessee, chosen on the 15th November, kept the bankrupt on the premises, carrying on the business for the benefit of the creditors, until the April following, and the assignee himself occasionally superintended, though on the 23rd December he had disclaimed the lease by letter to the landlord. It was held, that he had elected to accept the lease by using the premises for the benefit of the creditors. (s)

(o) *Hastings v. Wilson*, Holt, 290.

(r) *Thompson v. Bradbury*, 1

(p) *Thomas v. Pemberton*, 7 Taunt. 206.

Bingh. 326. N. S. 1 Sc. 279. 3 Dowl. Prac. Ca. 147.

(q) *Hanson v. Stevenson*, 1 B. & A. 303.

(s) *Clarke v. Hume*, 1 Ryan & Moo. 270.

On the same ground it was held, that in a case in which the assignees of a bankrupt coachmaker, who was tenant from year to year, and was under contract with numerous persons for the repair of carriages, entered for the purpose of continuing the work and performing the bankrupt's engagements; and after the sale on the premises, gave up the key to the bankrupt in August, but paid the rent up to Michaelmas, they were liable for the quarter's rent due at the Christmas following. (t)

4. by death

Lastly, When a man possessed of terms for years dies, having disposed of the property by will, the law, on the assent of the executor, vests it in the devisee as assignee by relation from the time of the death of the testator. (v)

Statute 1 Vict.
c. 26.

As to estates granted *pur autre vie*, it is by the recent statute of 1 Vict. c. 26, provided, that if no disposition by will be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come [to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of the said act, it shall be assets in his hands and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate. (w)

Merely
equitable.

The transfer of a mere equitable interest will not make the party assignee; and, therefore, the delivery and depositing of a lease as a security for money, without any written

(t) Ansell v. Robson, 2 Cr. & J. 610.

(v) Wentworth's Executors. 249.

(w) *Et vide* 29 Car. II. c. 3. 14 Geo. II. c. 20. 2 Bl. Com. 259. Watkin's Convey. 7 edit. p. 72.

assignment or mortgage, though it creates a right enforceable in equity, passes no interest at law. (x) And it has been held, that the devisee of an equity of redemption, (the legal estate remaining in the mortgagee) cannot be charged as the assignee of the mortgagor. (y)

In the case of *Lucas v. Comerford*, as reported by Mr. *Flight v. Bentley, and Moores v. Choat.* (x) an equitable mortgagee *had taken possession* and was in the receipt of the rents; the lessee was dead insolvent; the landlord filed his bill against the equitable mortgagee and the executors of the lessee; the mortgagee admitted, by his answer, that he was willing to perform some of the covenants, but not the covenant to rebuild. Lord C. *Thurlow* ordered the executors to execute a legal assignment, and the mortgagee to execute a counterpart, so as to make the latter liable at law to the covenants. In the modern case of *Flight v. Bentley*, a decree was obtained, ordering an equitable mortgagee, by deposit of title deeds, *who had not taken possession*, to pay the rent, and perform the covenants of the lease. (a) The decision in *Flight v. Bentley* created some alarm, and was, in substance, reheard by the Vice Chancellor in a subsequent case, by which the decision in *Flight v. Bentley* was in fact overruled. (b)

In order to make a man an assignee, it must appear that he claims through, and is in of the *same estate* as, the person whom he succeeds; for if he come in by an elder title, he will not be assignee. (c) So that the lord who enters for an escheat or forfeiture is not the assignee of his tenant, being in by title paramount. (d) And where lands were conveyed by A. to the use of such person as C. should appoint, and that in pursuance of this power C. appointed to D., it was held D. was in by the original conveyance, and was not the as-

The assignee must be in of the same estate as the person he succeeds.

(x) Doe dem. *Maslin v. Roe*, 5 Esp. 105.

(y) *Mayor, &c. of Carlisle v. Blamire*, 8 East, 487.

(z) Vol. 8, p. 499.

(a) 7 Sim. 149.

(b) *Moores v. Choat*, 8 Sim. 508, *et vide Jenkins v. Portman*, 1 Keene, 435.

(c) *Chaworth v. Phillips*, Moore, 876.

(d) Co. Lit. 215. b.

signee of C. (c) But it should be noticed, in considering this case, that the action was not maintainable, (it is conceived) even if D. had been the assignee of C., on the principle, that a covenant entered into by tenant in fee, will not run with the land to bind his assigns. (d)

In a recent case, it was decided, that if a lease be made by a party having an equitable estate only, but who afterwards acquires the legal estate; that although as between the lessor and lessee the latter cannot dispute his, the lessor's title, who may declare against his tenant for a breach of covenant, on a simple allegation, that being seised he made the lease; yet that a party taking a conveyance from the lessor would not be able to maintain an action on the covenants as the grantee of the reversion under the 32 Hen. VIII., c. 34, by reason that in pleading he must show his title, which would disclose that he had not the same estate as the lessor had when he granted the lease. (e)

A. devised lands to the use of H. J., for life, with power to make leases under certain restrictions, remainder to the plaintiff for life. H. J. accordingly made a lease and died; and the plaintiff having brought an action of covenant for rent due upon such lease subsequently to the death of H. J., it was objected that the plaintiff could not be considered as the assignee, because he derived his claim from the testator, and not through H. J. the lessor. But the Court of King's Bench held that the plaintiff was an assignee within the statute; because in fact the person granting the power, under which the lease was made was to be considered as the lessor, and the parties claiming through him as his assigns. (f) This was in accordance with the decision in *Whitlock's case*, (g) and is recognized as law in *Bringloe v. Goodson*. (h)

(c) *Roach v. Wadham*, 6 East, 289.

(d) *Cook v. Earl of Arundel*, Hardr. 87.

(e) *Whitton v. Peacock*, 2 Bing. 411. N. S.

(f) *Isherwood v. Oldknow*, 3 M. & S. 382. And see *Whitfield v. How*, 2 Show. 57. S. C. Sir T. Jones, 110. 1 Vent. 338.

(g) 8 Rep. 70.

(h) 4 Bing. 726. N. S.

A trustee, to whom a lease is assigned to secure an annuity to a third person, is strictly an assign liable to rent and covenants. (g)

The assignment being established, the next question will be, what new rights and liabilities arise between the parties, and how those previously existing between the lessor and lessee are effected?

In the first place it is to be observed, that by the original creation of the relation of landlord and tenant, a *privity of estate* exists between the lessor and the lessee; and in respect of any *express* covenants between them, they are farther bound by *privity of contract*: though it seems that for covenants *in law* they are only answerable by reason of *privity of estate*. (h)

Privity of estate and privity of contract.

In the next place, where either the reversionary interest of the lessor, or the possessory estate of the lessee, is transferred to a third person, who is a stranger to the original contract of lease, he can be affected by such covenants only as run with the land, and can have no concern with those which are merely personal; because the only connection which exists between the grantee of the reversion and the tenant, or the lessor and the assignee, is by means of the estate to which both are privy: and here arises a distinction so extremely refined, that it may be difficult to discern the good sense or reason which could have dictated it. It seems that it will not be a safe rule to lay down that the assignee will be bound by all the assignor's covenants which affect the land: but two additional points remain to be ascertained; *viz.*, 1. Whether the covenant concerns a thing *already* in existence upon the land, or whether it respects something only which is *hereafter* to be done upon or concerning the land; and, 2. Whether the assignor has covenanted not only for himself, his heirs, and executors,

Assignee affected only by covenants running with the land.

(g) *Gretton v. Diggles*, 4 Taunt. 766.

Jones, 223. *Anon.* 1 Sid. 447. *Auriol v. Mills*, 4 T. R. 98.

(h) *Bacheloure v. Gage*, Sir W.

When assignee
bound though
not named :

when not
bound unless
named,

but also for his *assigns*. Because, if the covenant or condition affect a thing *in esse*, parcel of the demise, the covenant is immediately affixed to such thing, and will bind the assignee *although he be not named* : but on the other hand, if the covenant be made concerning a thing not *in esse* at the time of the demise, but which is to be made or done upon the land demised, there the assignee will not be bound, *unless he be expressly named*. (i) Accordingly, a covenant for quiet enjoyment ; (k) for further assurance ; (l) for renewal ; (m) to repair the demised premises ; (n) to pay rent ; (o) to discharge the lessor of charges ordinary and extraordinary ; (p) to permit the lessor to have free passage to two rooms excepted in the demise ; (q) to cultivate the lands in a particular manner ; (r) to reside upon the premises ; (s) to supply the premises demised with a sufficient quantity of good water ; (t) not to carry on particular trades ; (u) these have been all held to bind the assignee, though he be not named. But a covenant to build *a new wall* upon the demised premises will only be binding upon the assignee, in case he be expressly named in the covenant. (v) And where the lessee covenanted to leave

(i) Spencer's case, 5 Rep. 16. 1st and 2d Resolutions, Hyde v. Dean and Chapter of Windsor, Cro. Eliz. 457. But see Anon. Moore, 159.

(k) Noke v. Awder, Cro. Eliz. 436. S. C. Moore, 419. Campbell v. Lewis, 3 B. & A. 392. 3 Moore, 35, 61. 8 Taunt. 715.

(l) Middlemore v. Goodale, Cro. Car. 503.

(m) Spencer's case, *supra*. 6th Resolution. Roe dem. Bamford v. Hayley, 12 East, 464.

(n) *Ibid*. Doe dem. Dean and Chapter of Windsor's case, 5 Rep. 24. S. C. (Hyde v. Dean and Chapter of Windsor,) Cro. Eliz. [457.] 552. Dyer, 13. *b. in marg.* Barnard v. Godscall, Cro. Jac. 309. Conan v. Kemise, Sir W. Jones, 245. S. C. (Conghan v. King, Cro.

Car. 221. Tilney v. Norris, Id. Raym. 553. Potter v. Swetnam, Style, 406. Smith v. Arnold, 3 Salk. 4.

(o) *Ibid*. Parker v. Webb, 3 Salk. 5.

(p) Dean and Chapter of Windsor's case, 5 Rep. 25.

(q) Cole's case, 1 Salk. 196. S. C. Bush v. Calis, 1 Show. 389. 12 Mod. 24. Carth. 232.

(r) Cockson v. Cock, Cro. Jac. 125

(s) Tatem v. Chaplin, 4 B. & A. 266.

(t) Jourdain v. Wilson, 4 B. & A. 266.

(u) See Mayor of Congleton v. Patteson, 10 East, 136.

(v) Spencer's case, 5 Rep. 16. 1st and 2d Resolutions.

all the trees he should plant during the term; and the lessor covenanted *for himself, his executors and administrators*, to pay for the trees at a fair valuation by two persons to be named by each party, their executors, administrators, and assigns: and upon the expiration of the term the assignee of the lessor refused to name an arbitrator, upon which an action of covenant was brought by the lessee against the assignee; the Court of King's Bench held, upon the authority of *Spencer's* case, that the covenant to refer to arbitration did not run with the land; and, therefore, the assignee was not bound by it, *not being named.* (w)

The general principle to be deduced from all these cases is, that if the performance of the covenant be beneficial to the reversioner, in respect of the lessor's demand, and to no other person, his assignee may sue upon it; but if it be beneficial to the lessor, without regard to his continuing owner of the estate, it is a mere collateral covenant, upon which the assignee cannot sue. (x)

Covenants affecting incorporeal hereditaments stand upon the same footing with covenants respecting land.

A lessee of tithes covenanted for himself, his executors, administrators, and assigns, not to let any of the farmers, occupying the estate out of which the tithes arose, have any part of the tithes without the consent of the lessor; and further covenanted for himself and his assigns to find and allow to the lessor sufficient wheat-straw for thatching any of the buildings then in the lessor's occupation; the lessee assigned to the defendant, who suffered several of the farmers to retain part of the tithes without the lessor's consent. An action having been brought against the defendant for this breach of the covenant, and a verdict being had for the

(w) 2 Chitt. Rep. 482. And see also the judgment of Lord Tenterden in *Sampson v. Easterby*, 9 B. & C. 505.

(x) Per Best, J., in *Vyvyan v. Arthur*, 1 B. & C. 417.

plaintiff, it was moved, in arrest of judgment, that the action would not lie against the defendant, inasmuch as the covenant was merely personal and collateral, binding the lessee only; that tithes were incorporeal, lying in grant, and therefore would not endure such an annexation of covenant. But the Court were of opinion that there was not any difference between land and tithes as to the annexation of covenants; that this covenant was not a mere collateral covenant, but related to the thing demised materially and essentially, tending to preserve it, and as such was binding on the assignee being named, and there being a privity in respect of the reversion in the lessor. (y)

But where the lessee of tithes agreed with the owner of land, for certain collateral considerations, not to take tithes in kind from the tenants of the lands for twelve years, but to accept a reasonable composition not exceeding 3s. 6d., and by such agreement bound himself and *his assigns*; the Court of Exchequer held that this contract was merely personal, and did not run with the tithes. (x)

When assignee
not bound al-
though named.

Where a covenant in no manner affects the thing demised, but is wholly collateral to it, it will not bind the assignee, even though he be expressly named; as if there be a covenant to build a wall upon land *not being parcel* of the land demised, or to pay a sum of money to the lessor or a stranger, this is merely a personal covenant, and cannot affect the assignee. (a)

So if the covenant only affect the land demised collaterally, and have no immediate effect upon its nature, quality, or value, it will not run with the land, or bind the assignee. Therefore a covenant by the lessee to pay so much annually

(y) *Bally v. Wells*, 3 Wils. 25. Resolution. *Cook v. Earl of Arundel*, Hard. 87. *James v. Blunk*, S. C. Wilmot's Rep. 341. *ibid.* 88.
(z) *Brewer v. Hill*, 2 Anstr. 413.
(a) *Spencer's case*, *supra*, 2d

to the churchwardens and overseers for the use of the poor will not bind the assignee, though specially named. (b)

So where in a lease of land, with liberty to make a water-course and erect a mill, the lessee covenanted for himself, his executors *and assigns*, not to hire persons to work in the mill who were settled in other parishes; the Court of King's Bench held, that this covenant did not run with the land, or bind the assignee. (c) And though the thing covenanted for may be beneficial to the reversion of the land, it will not bind the assignee, though named, *unless it be to be done upon the land demised*; as if the lessee covenanted to make a communication by water from the demised premises, *through other person's lands* to another place, to facilitate the access to a market. (d)

And in the case of a demise of mere personal chattels, as cattle, goods, &c., a covenant by the lessee will not be binding upon the assignee, even though he be expressly named. And, therefore, if a man lease sheep for a term, and the lessee covenant for himself and his assigns to deliver up, at the end of the term, the same sheep or others of the same value, and the lessee assign over the sheep, the assignee will not be bound by this covenant, for there is not any privity, nor any reversion, but merely a thing in action in the personalty, which cannot bind any but the covenantor, his executors or administrators, who represent him. (e)

To sum up the preceding remarks, in the case of an assignment of leaseholds, the *covenants in law*, being inherent in the estate, pass along with it from the assignor to the assignee. *Express covenants* running with the land stand upon nearly the same ground as covenants in law, and may always be *taken advantage of* by the assignee;

(b) *Mayo v. Buckhurst*, Cro. Jac. 438.

(c) *The Mayor, &c., of Congleton v. Pattison*, 10 East, 130.

(d) *Per Bayley, J. Ibid. Hartley v. Pehall*, Peake's N. P. C. 178.

(e) *Spencer's case*, *supra*, 3d Resolution.

who, on the other hand, will be *bound* by such covenants, whenever they affect the present state of the land, even though he be not named : but if they respect something to have a future existence upon, or in respect of the land, they will run with the land, and be binding on the assignee, *provided only he be named*. Mere collateral covenants never can run with the land ; and can only be binding between the covenanting parties, and those persons who upon the death of the parties become possessed of assets, and remain answerable in respect thereof.

A due attention to these points will be necessary in considering the relative situation of the parties after an assignment has taken place. For, 1. Where the *lessor* grants over his reversion, questions arise as to what new rights and liabilities spring up between the *grantee* of the reversion and the lessee, and what rights, &c., remain between the lessor and lessee. And, 2. Where the estate of the *lessee* passes by assignment to a stranger, questions arise as to what new rights exist between the lessor and assignee, and what rights remain between the lessor and lessee. And 3. Where the lessor grants over the reversion and the lessee assigns the term, what rights and liabilities arise between the grantee and assignee.

1. Rights, &c.
how affected
by grant of
reversion.

First, then, we are to consider how the rights of the several parties stand affected by the lessor's granting over his reversion to a stranger.

1. As between
grantee and
lessee.

1. As between the grantee of the reversion and the lessee. The rights of the stranger to whom a reversion has been granted seem to have been by no means defined by common law. It was admitted that he would have a right to sue the tenant for the rent which might be reserved, because that was incident to the reversion ; (f) and that covenants *in law* would also pass with the reversion. (g) But,

(f) Bro. Abr. *Dette*, 140. Walker's case, 3 Rep. 22. *b.* Barker v. Damer, 3 Mod. 338. Glover v. Cope,

4 Mod. 81.

(g) Harper v. Burgh, 2 Lev. 206. S. C. Sir T. Jones, 102.

with respect to the express *covenants and conditions* contained in the lease, the prevailing opinion appears to have been that the grantee of the reversion, being a mere stranger, could not avail himself of these. (h) To remedy this defect (which seems to have been most severely felt upon the dissolution of the monasteries, when the king and his grantees were the parties to take advantage of the covenants in the outstanding leases,) the statute 32 Hen. VIII. c. 34, ^{32 Hen. VIII. c. 34.} was passed, which, after reciting that “ Where [as] before that time as well temporal as ecclesiastical and religious persons have made sundry leases, demises, and grants, to divers other persons of sundry manors, lordships, fermes, meases, lands, tenements, meadows, pastures, or other hereditaments, for term of life or lives, or for term of years, by writing under their seal or seals, containing certain conditions, covenants, and agreements, to be performed as well on the part and behalf of the said lessees and grantees, their executors and assigns, as on the behalf of the said lessors and grantors, their heirs and successors: and forasmuch as by the common law of this realm no stranger to any covenant, action, or condition, shall take any advantage or benefit of the same by any means or ways in the law, but only such as be parties or privies thereto, by the reason whereof as well all grantees of reversions, as also all grantees and patentees of the king our sovereign lord, of sundry manors, lordships, granges, fermes, meases, lands, tenements, meadows, pastures, or other hereditaments, late belonging to monasteries and other religious and ecclesiastical houses dissolved, suppressed, renounced, relinquished, forfeited, given up, or by other means come into the hands and possession of the king’s majesty since the 4th day of February, the seven-and-twentieth year of his most noble reign, be excluded to have any entry or action against the said lessees and grantees, their executors or assigns, which the lessors before that time might by the law have had against the same lessees for the breach of any con-

(h) *Vide* Thursby v. Plant, 1 1 Wils. 165. Isherwood v. Old-Saund. 238, 240. Barker v. Damer, know, 3 M. & S. 382.
3 Mod. 338. Thrale v. Cornwall,

dition, covenant, or agreement, comprised in the indentures of their said leases, demises, and grants;"—enacts, that as well all and every person and persons, and bodies politic, their heirs, successors, and assigns, which have or shall have any gift or grant of our said sovereign lord by his letters patent of any lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments, or of any reversion or reversions of the same which did belong or appertain to any of the said monasteries and other religious and ecclesiastical houses dissolved, suppressed, relinquished, forfeited, or by any other means come to the king's hands, which at any time theretofore did belong or appertain to any other person or persons, and after came to the hands of our said sovereign lord, as also all other persons being grantees or assignees to or by our said sovereign lord the king, or to or by any other person or persons than the king's highness, and the heirs, executors, successors, and assigns of every of them, shall and may have and enjoy like advantages against the lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing of waste, or other forfeiture, (i) and also shall and may have and enjoy all and every such like and the same advantage, benefit, and remedies by action only for not performing of other conditions, covenants, or agreements, contained and expressed in the indentures of their said leases, demises, or grants, against all and every the said lessees and farmers, and grantees, their executors, administrators and assigns, as the said lessors or grantors themselves, or their heirs or successors, ought, should, or might have had and enjoyed at any time or times, in like manner and form as if the reversion of such lands, tenements, or hereditaments, had not come to the hands of our said sovereign lord.

This statute transfers the right of the lessor ;

The effect of this statute is, it is said, to transfer to the grantee *the privity of contract* ; or more correctly the rights which the lessor had against the lessee by reason of the con-

(i) *I. e.* Forfeiture of the like nature. Co. Lit. 215, b.

ditions and covenants running with the land. So that now the grantee of the reversion may take advantage of all such covenants, whether in law or in deed, although only the lessor and his heirs be named in the lease; (*k*) but in order to obtain this right under the statute, he must be in possession of the same estate as the lessor had at the time of granting the lease. (*l*)

Upon this statute, then, it is to be observed, 1. That it extends not only to the grantees of reversions of the crown, but also to those of the subject. (*m*)

and extends
1. to all
grantees of
reversions;

2. That it affects only estates for life and for years, and not estates in fee or in tail. (*n*)

2. to estates
for lives and
years;

3. That copyholds come within this statute; and that consequently the surrenderees of the reversions of copyhold estates may take advantage of covenants running with the land. (*o*)

3. to copy-
holds;

4. The grantee of *part of the reversion* is entitled under the statute to his remedy upon the covenants in the original lease. Therefore, where A. made a lease for years to B., who entered, and A. afterwards devised the reversion to C. *for life*, and upon A.'s death C. granted it to D. *for forty years*, if C. should so long live, it was holden that D. might maintain covenant against the lessee or his representatives. (*p*)

4. to the
grantee of
part of the
reversion;

If a lease be made for twenty-one years, and an underlease granted, reserving ten days rendering rent, and a grant be afterwards made by the lessee of the premises, and of the rent

(*k*) Anon. Moore, 159. Kitchen v. Buckley, 1 Lev. 109. Thursby v. Plant, 1 Saund. 237, *et vide* Earl of Portmore v. Bunn, 1 B. & C. 694.

(*l*) Whitton v. Peacock, 2 Bing. 411. N. S. *et vide* Webb v. Russel, 3 T. R. 393.

(*m*) Co. Lit. 215. *a*.

(*n*) *Ibid.* Matures v. Westwood, Cro. Eliz. 617.

(*o*) Glover v. Cope, 3 Lev. 327. S. C. Skin. 305. 1 Salk. 185. Carth. 205. 1 Show. 284. 4 Mod. 80. *contra*, Swinnerton v. Miller, Hob. 177. Brasier v. Beale, Yelv. 222. S. C. Cro. Jac. 305. Platt v. Plommer, Cro. Car. 24. Whitton v. Peacock, 3 M. & K. 325.

(*p*) Attoe v. Hemmings, 2 Bulstr. 281.

reserved to another for a term corresponding with the underlease, this will be a grant of part of the reversion, and entitle the grantee to maintain an action on the covenants. (*q*)

5. to the grantee of the reversion of part of the premises ;

5. And it is now clearly settled that the assignee of the reversion of *part of the demised premises* may maintain covenant against the lessee. (*r*)

6. to such persons only as claim under the lessor ;

6. The statute extends to such persons only as claim under the lessor, and not to such as come in by title paramount ; as the lord who enters for a forfeiture : (*s*) or parties claiming through the lessor under a different estate. (*t*)

7. to such covenants only as run with the land.

7. But the grantee of a reversion can take advantage of such covenants only as run with the land, and not of any collateral covenants. (*u*)

Where, therefore, the mortgagor and mortgagee of a term made an under lease, in which the tenant covenanted for rent, repairs, &c., with the *mortgagor* and his assigns only, it was held that the assignee of the *mortgagee* could not maintain an action for the breach of these covenants, because they were collateral covenants, being made with the mortgagor, who was in fact a mere stranger in point of law ; the term being vested by the mortgage in the mortgagee ; (*v*) but an action might be maintained against the tenant in the name of the mortgagor or his personal representatives, the covenant being in gross. (*w*)

Where a term of years was granted to A. by way of mortgage for securing a sum of money ; and the mortgagor

(*q*) *Burton v. Barclay*, 7 Bing. 745.

(*r*) *Twynam v. Pickard*, 2 Barn. & Ald. 105. And see *Sherewood v. Nonnes*, 1 Leon. 250. *Kitchen v. Buckley*, 1 Lev. 109. S. C. 1 Sid. 157. *Sir T. Raym.* 80.

(*s*) Co. Lit. 215. *b. Chaworth v. Phillips*, Moore, 876, cited *supra*.

(*t*) *Vide Whitton v. Peacock*, *supra*.

(*u*) *Matures v. Westwood*, *supra*. *Brett v. Cumberland*, Cro. Jac. 522. *Ashurst v. Mingay*, 2 Show. 133. S. C. *Sir T. Jones*, 144.

(*v*) *Webb v. Russel*, 3 T. R. 393.

(*w*) *Stokes v. Russel*, *ibid.* 678.

covenanted with A., his executors, and assigns, to pay the money at a certain day; after which A. died, having appointed B. his executor, to whom he bequeathed the sum secured, it was holden that the covenant to A. was merely personal, and that B. could not sue upon it *as assignee*, although he might in his character of executor. (x)

Where A. being seised in fee of a mill, and also of certain lands, made a lease of the lands, the lessee paying to A., his heirs, and assigns, certain rents, and doing certain services, and also suit to the mill of A., his heirs, and assigns, by grinding there all such corn as should grow upon the demised premises; and A. afterwards demised the mill *and* the reversion of the demised premises to B.: the Court of King's Bench held that the reservation of the suit to the mill was in the nature of a rent, and a covenant to render it resulted from the *reddendum*, which was a covenant running with the land so long as both mill and land were vested in the same person, and consequently that B. might sue upon it as assignee of A. (y)

A question, bearing some analogy to this case, lately arose upon a covenant (very frequently inserted in the leases granted by the great London brewers of those public houses of which they are the landlords) requiring the lessee and his assigns to buy all beer, to be consumed upon the premises demised, of the lessor, his successors, and assigns. The plaintiffs proved that they had succeeded to the business, and were the assignees of the reversion of the original lessor, and that the defendant was the assignee of a lease containing such a covenant; and thereupon a verdict was taken for the plaintiffs, subject to a special case. On argument, it appeared that the trade of the brewers had been removed to a distance of two miles; and it was, therefore, held that the trade of the lessors had determined, and that their assignees could

(x) *Canham v. Rust*, 8 Taunt. 227.

(y) *Vyvyan v. Arthur*, 1 B. & C. 410.

not take advantage of the breach of covenant ; (s) but whether the covenant would have run with the land, was left undecided. (a)

Assignee of
rent.

8. The statute does not extend to the assignee of a rent issuing out of the land. Thus, if tenant in fee grant a charge out of lands, and covenant to pay it without deduction for himself and his heirs, covenant may be maintained against the grantor and his heirs, but not against his assignee ; for it is a mere personal covenant, and cannot run with the land. (b)

It is true that in the case referred to, Lord *Holt* went on to say "I make no doubt but that the *assignee of the rent* shall have covenant against the grantor, because it is a covenant annexed to the thing granted ;" but Lord *Ellenborough*, in the case next cited, says, "I am inclined to think that the language of Lord *Holt*, as to the right of the assignee of the rent to have covenant, was extra judicial ; and putting aside that dictum, I do not find any authority to warrant the position that this covenant runs with the rent." (c)

And where J. B. being seised in fee, conveyed lands to the use that J. B., his heirs and assigns, might have, and take to his use a rent certain to be issuing out of the premises, and subject to the said rent to the use of the defendant, his heirs and assigns ; and defendant covenanted with J. B., his heirs and assigns, to pay to him his heirs and assigns the said rent, and to build within one year one or more messuages on the premises, for better securing the said rent ; and J. B. within one year demised the said rent to plaintiffs for 1,000 years : it was held, that covenant would not lie for the plaintiffs for non-payment

(s) Doe dem. *Calvert v. Reid*, Cor. Lord Tenterden and S. J. Sittings before Michaelmas Term, 1828. It had been before questioned whether such a covenant will bind the assignee of the lease ; see *Jones v. Edney*, 3 Camb. 284.

Cooper v. Twibill, *ibid.* *Holcomb v. Hewson*, 2 Campb. 391. *Hartley v. Pehall*, Peake's N. P. C. 131.

(a) 10 B. & C. 849.

(b) *Per Holt*, C. J., *Brewster v. Kedgill*, *Ld. Raymond*, 317.

(c) *Milnes v. Branch*, 5 M. & S. 417.

of the rent, or for not building the messuages, for the covenant was personal. (*d*)

The grantee or assignee of the reversion can only sue for a breach of covenant, happening after the grant or assignment to him; (*e*) but if the covenant is broken before the assignment, and continues so afterwards, he may then sue for the original breach. (*f*) And if a breach happen in the time of the grantee, and then he assign the reversion over, he may bring covenant against the lessee for the breach so happening in his time, notwithstanding he has parted with the estate; (*g*) and the lessor may maintain an action against the assignee of the lease on the covenant running with the land for a breach of covenant during the period of possession by such assignee, although the action is not commenced until after he has assigned over. (*h*)

The statute 32 Hen. VIII. c. 34, which gives to the grantee or assignee of the reversion a remedy for breach of covenant against the lessee and his representatives, imparts a reciprocal benefit, and gives a right of action to the lessee and his representatives against the grantee of the reversion.

Rights of the lessee and his assignees under the statute.

For by the second section of that statute it is provided "That all farmers, lessees, and grantees of lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments for term of years, life or lives, their executors, administrators, and assigns, shall and may have like action, advantage, and remedy, against all and every person and persons, and bodies politic, their heirs, successors, and assigns, which have or shall have any gift or grant

(*d*) *Milnes v. Branch*, 5 M. & S. 411. *Cook v. Earl of Arundel*, Hard. 87.

(*e*) *Lewes v. Ridge*, Cro. Eliz. 863.

(*f*) *Mascal's case*, Moore, 242. Com. Dig. *Covenant* (B. 3.)

(*g*) *Midgley v. Lovelace*, Carth. 289. S. C. Holt, 74. 12 Mod. 45.

(*h*) *Harley v. King*, 2 C., M. & R. 18. And see *Onslow v. Corrie*, 2 Madd. 343. *Philpot v. Hoare*, 2 Atk. 249. Amb. 480. *Treackle v. Cole*, 1 Vern. 165.

of the King, or of any other person or persons of the reversion of the same manors, lands, tenements, and other hereditaments, so letten, or any parcel thereof, for any condition, covenant, or agreement contained and expressed in the indentures of their lease and leases, as the same lessees or any of them might and should have had against the said lessors and grantors, their heirs and successors, all benefits and advantages of recoveries in value by reason of any warranty in deed or in law by voucher or otherwise only excepted."

So that the remedy is mutual; and where the act extends to give the grantee of the reversion a right of action against the lessee, there also it extends to give the lessee a right of action against the grantee of the reversion. (i)

2. As between the lessor and lessee.

The lessor cannot sue after the grant, for breaches subsequent to the grant.

except upon collateral covenants.

Since the statute *transfers* to the grantee of the reversion the right to take advantage of the conditions and covenants running with the land, it seems clear that the lessor cannot, after he has parted with the reversion, bring an action for any breach of such covenant which has taken place subsequently to the grant: for then the tenant would be liable to two actions, or the lessor might, after the grant, release the covenant to the lessee. (k) But as the statute affects such covenants only as run with the land, it follows that upon collateral covenants the rights of the parties remain in *statu quo*.

II. Rights, &c. how affected by assignment of the lessee's estate.

II. We are to consider how the rights of the several parties stand affected by the assignment of the lessee to a stranger.

1. As between lessor and assignee.

1. As between the lessor and assignee.

(i) Anon. Moore, 159.

1 Saund. 241. b. n. (6).

(k) Beely v. Purry, 3 Lev. 154.

Immediately upon the assignment, the lessor acquires a right against the assignee by reason of the privity of estate; and may enforce against him all the covenants in law, and those in deed which run with the land. (*l*) And the lessor may at the same time sue the lessee upon his express covenant, and the assignee in respect of the privity of estate: but then he will be permitted to take out execution against one only. (*m*)

The assignee cannot be charged for a breach of the covenant happening previously to the assignment to him. As where the lessee covenanted for himself and his assigns to rebuild and finish a house upon the land demised within a certain time, and after that time had expired assigned the lease, it was holden that this covenant could not bind the assignee, because it was broken before the assignment;—though it would have been otherwise if the lessee had assigned before the time had expired. (*n*)

But, immediately upon the assignment being made, the assignee becomes liable, *even before his entry* upon the premises. (*o*)

In one case a distinction was set up between a common assignment, and an assignment by way of mortgage: and the Court of King's Bench held that a mortgagee of a term could not be sued *as assignee*, upon the mortgagor's covenants, unless he actually entered into the premises. (*p*) But this case, which seems always to have excited the disapprobation of the profession, (*q*) has at length been formally over-

(*l*) Webb v. Russell, 3 T. R. 393.

(*m*) Brett v. Cumberland, Cro. Jac. 523.

(*n*) Grescot v. Green, 1 Salk. 199. S. P. Churchwardens of St. Saviour's v. Smith, Burr. 1271. S. C. Bl. Rep. 351.

(*o*) Walker v. Reeves, Dougl. 461. *æ*. See Cook v. Harris, Ld. Raym. 367.

(*p*) Eaton v. Jaques, Dougl. 455.

contra, Anon. 2 Freem. 253.

Sparkes v. Smith, 2 Vern. 275.

Pilkington v. Shaller, *ibid.* 374.

Lucas v. Comerford, 1 Ves. jun.

235. S. C. 3 Bro. Ch. Rep. 166.

(*q*) *Vide* Westerdell v. Dale, 7

T. R. 312. Stone v. Evans, cited

7 East. 341.

ruled ; and it is now settled that a mortgagee stands in the same situation as any other assignee, and as such is liable to the covenants in the mortgagor's lease, even though he never enter upon the premises. (*r*)

The assignee being liable upon the covenants merely in respect of the privity of estate, and no privity of contract existing between him and the original lessor, it follows that his liability to the lessor, can only last so long as he remains possessed of the estate. As soon as he assigns *the whole* of it over, the privity is destroyed, and his liability ended, though the assignment be made without notice to the lessor, (*s*) and although the lease contain a covenant that the lessee, his executors, administrators, or assigns, will not assign without consent. (*t*) Nor will an assignment to a mere pauper be deemed fraudulent: the lessor still retaining his right of action against the lessee upon the privity of contract. (*u*) And so an assignment to a *feme covert* will discharge the assignee. (*v*) And it has been decided that the assignee of a term, *declared against as such*, is not liable to the lessor after he has assigned over, though it be shewn that the lessor was a party executing the assignment, and thereby agreed that the term, which was determinable at his option, should be absolute. (*w*)

To what extent an assignee may be liable who takes an assignment, *subject* to the rent and covenants, but does

(*r*) *Williams v. Bosanquet*, 1 Brod. & Bing. 238, *et vide* *Burton v. Barclay*, 7 Bing. 745.

(*s*) *Pitcher v. Tovey*, 1 Show. 340. S. C. 4 Mod. 71. 1 Salk. 81. 2 Ventr. 234. 3 Lev. 295. Carth. 177. Holt, 73. 12 Mod. 23. *Boulton v. Canon*, 1 Freem. 336. *City of London v. Richmond*, 2 Vern. 421. *Buckland v. Hall*, 8 Ves. 95. *Staines v. Morris*, 1 Ves. & Bea. 11.

(*t*) *Paul v. Nurse*, 8 B. & C. 486. 2 Man. & Ryl. 525.

(*u*) *Valiant v. Dodemede*, 2 Atk. 546. *Le Keux v. Nash*, Str. 1221. *Huddle v. Hawksby*, cited *ibid.* *Taylor v. Shum*, 1 Bos. & Pul. 21.

(*v*) *Barnfather v. Jordan*, Dougl. 452. "For a *feme covert* is of capacity to purchase of others, without the consent of her husband: and though he may disagree and divest the estate; yet, if he neither agree nor disagree, the purchase is good." Co. Lit. 3. a.

(*w*) *Chancellor v. Poole*, Dougl. 764.

not enter into an *express* covenant to pay the rent or perform the covenants, has lately been much discussed in the Courts.

Where a lessee by *deed-poll* assigned to A. his interest in the demised premises, subject to the payment of the rent and the performance of the covenants contained in the lease; and the assignee took possession, and before the expiration of the term assigned to a third person; and the lessor sued the lessee for breaches of covenant, *committed during the time the first assignee continued assignee* of the premises, and recovered damages against the lessee; it was held that the lessee might maintain *an action on the case* founded in tort against A., for having neglected to perform the covenants *during the time he continued assignee*, whereby the lessee sustained damage; and the judges seemed to be of opinion, that under such circumstances, *assumpsit* would lie as well as case, (x) but not covenant; the assignment being by deed-pole executed by the lessor only; which certainly seemed to raise the inference that if the assignment had been by indenture executed by both parties, an action of covenant was maintainable.

In *Steward v. Woolveridge*, (y) the assignment *was* by indenture executed by both parties, and was made subject to rent and covenants, but without any express covenant on the part of the assignee to pay the rent, or perform the covenants; the lessee was called on to pay the rent *after* the assignee had assigned over, and the lessee then brought an action of covenant against the assignee; the Court of Common Pleas held, on the authority of *Burnett v. Lynch*, that the word "subject, &c.," created an *express* covenant, and rendered the assignee liable to the lessee during the continuance of the term. From this decision there was an appeal to the Court of Exchequer Chamber, which reversed

(x) *Burnett v. Lynch*, 5 B. & C. 589.

(y) 9 Bingh. 60. 2 Moo. & Sc. 75.

the judgment, on the ground that the words, "subject, &c." were of qualification and not of contract. (x)

In order to discharge the assignee of his liability to the lessor in respect of the rent, it is necessary that he assign *all* his estate; otherwise he will be liable *pro tanto*, the covenant running with the land being divisible. And in like manner, though only *part* be assigned, the assignee is chargeable *pro tanto*; and if the assignee assign part, his assignee is chargeable *pro tanto*. (a)

Though eviction out of part of the estate will discharge the lessee from the payment of rent, yet the case is different with an assignee: for as he is only liable upon his *real* contract in respect of the land, and not on his *personal* contract, he will be liable for a part of the rent; and eviction out of part will only discharge him *pro tanto*. (b)

On the other hand the assignee of the lessee, and his assignee *ad infinitum*, whether by law or in deed, may take advantage of the covenants, which run with the land, against the lessor. And so of the assignee of *part* of the premises. (c)

Where A., lessee of J. S., assigned his term in part of the premises to B., and covenanted with B. for quiet enjoyment, and B. assigned over the premises to C.; and J. S. entered upon C., for a forfeiture by breach of covenant in A. previously to the assignment to B.; the Court of King's Bench held that C. might sue A. upon the covenant for quiet enjoyment, by reason of the privity of estate existing between him and A. (d)

(z) *Wolveridge v. Steward*, 3 Moo. & Sc. 561. 2 Cr. & Mees. 645.

(a) *Congham v. King*, Cro. Car. 221. S. C. (*Conan v. Kemise*), Sir W. Jones, 245.

(b) *Stevenson v. Lambard*, 2 East, 575.

(c) *Spencer's case*, 5 Rep. 17. b.

4, 5, & 7th Resolutions. *Chapman v. Dalton*, Plowd. 284. a. *Hyde v. Dean and Chapter of Windsor*, Cro. Eliz. 457, 553. *Palmer v. Edwards*, Dougl. 187. n.

(d) *Campbell v. Lewis*, 3 B. & A. 392.

The assignee, however, will only have a right to take advantage of a breach of covenant in his time; and therefore covenant does not in general lie by the assignee for a breach committed before the assignment, unless such breach be still continued. (*e*)

2. As between the lessor and lessee.

2. As between
lessor and
lessee.

The lessor and lessee, we have seen, are bound to one another in respect of the covenants in law, and the duties prescribed by law as incident to the relation of landlord and tenant by *privity of estate*; and in respect of conditions and covenants in deed, by *privity of contract*. Now the *privity of estate* exists no longer than the relation of landlord and tenant; and, therefore, if the lessee part with his estate to a stranger with the concurrence of his lessor, the privity of estate is destroyed, and his liability thereupon ceases. (*f*) But it is not competent to him to put an end to the privity of estate *without his landlord's assent*; and, therefore, in order to discharge the lessee, it is necessary that the lessor testify his assent to the assignment either expressly, or impliedly, as by receiving rent from the assignee, or recognizing him as his tenant by some other act. (*g*)

But it is otherwise in respect of the lessee's liability upon the privity of *contract*. For when he has entered into an express agreement, he is so completely bound thereby, that no assignment, either of part or the whole of the estate, can exonerate him, even though the lessor assent to the assignment, and receive rent of the assignee. (*h*)

(*e*) Com. Dig. *Covenant* (B. 3.)

(*f*) Walker's case, 3 Rep. 24. *b*.
March v. Brace, 2 Bulstr. 151. S. C.
Cro. Jac. 334. Brett v. Cumberland,
Cro. Jac. 523. Anon. 1 Sid. 447.
Thursby v. Plant, 1 Saund. 240. n. (5).
Ashurst v. Mingay, Show. 134.

(*g*) *Ibid*. Wadham v. Marlow, 8
East, 316. n. Auriol v. Mills, 4
T. R. 98.

(*h*) Rushden's case, Dyer, 4. *b*.
Broom v. Hore, Cro. Eliz. 633. Ma-
tures v. Westwood, *ibid*. 617. Ards
v. Watkin, *ibid*. 637. Barnard v. God-
call, Cro. Jac. 308. Brett v. Cumber-

As the lessee's assignment *by his own act* will not release him from his express covenants, so neither will an assignment, by act of law.

Therefore, if the lessee's estate be assigned by act of parliament, he will not be discharged from his express covenants, unless the act be express to that purpose. (*i*)

So, if the lease be taken from him under an execution, he still remains liable upon his express covenants. (*k*)

So, it seems, a felon convict is liable upon an express covenant, notwithstanding his attainder and the forfeiture of his property. (*l*)

And an insolvent debtor was formerly liable upon his express covenants for a breach subsequent to his discharge, provided no release was given by the particular statute under which he was discharged. (*m*)

But by the statutes of the 5 Geo. IV. c. 61, and 7 Geo. IV. c. 56, it is enacted, that in all cases in which any prisoner petitioning the Court, shall be entitled to any lease, or agreement for a lease, and his assignee shall accept the same and the benefit thereof, as part of such prisoner's estate and effects, the prisoner shall not be, or be deemed to be, liable to pay any subsequent rent to which his or her discharge, adjudicated according to the act, would not apply, nor be in any manner sued after such acceptance in respect or by reason of any subsequent non-ob-

land, *ibid.* 522. *Bachelour v. Gage*, Cro. Car. 188. *Norton v. Acklane*, *ibid.* 580. *Ashurst v. Mingay*, 2 Show. 134. *Parker v. Webb*, 3 Salk. 5. *Wadham v. Marlow*, 8 East, 314. n. *Buckland v. Hall*, 8 Ves. 95. *Staines v. Morris*, 1 Ves. & Bea. 11.

(*i*) *Hornby v. Houlditch*, An-

draws, 40. S. C. cited 1 T. R. 92.

(*k*) *Vide Auriol v. Mills*, 4 T. R. 99.

(*l*) *Banester v. Trussell*, 2 And. 38. S. C. Cro. Eliz. 516. *Owen*, 69. And see 1 H. Bl. 441.

(*m*) *Cotterel v. Hooke*, Dougl. 97. *Aylet v. James*, cited 1 H. Bl. 441.

servance or non-performance of the conditions, covenants, or agreements therein contained : provided, that in all such cases as aforesaid, it shall be lawful for the lessor or person agreeing to make such lease, his heirs, executors, administrators, or assigns, if the assignees shall decline, upon being required so to do, to determine whether they will or will not accept such lease or agreement for a lease, to apply to the Court, praying that they may either so accept the same, or deliver up the lease or agreement for a lease, and the possession of the premises demised or intended to be demised ; and the Court, or commissioner, shall thereupon make such order as in all the circumstances of the case shall seem meet and just, and such order shall be binding on all parties.

It has been decided, that the assignment to the provisional assignee, (in case no fraud has been committed) passes such property only as the insolvent possessed at the date of the assignment. (*n*)

By the assignment, the property vests in the provisional assignee so as to prevent the insolvent from maintaining ejectment against his tenant, although the assignee has not entered or done any other act shewing his acceptance of his lease ; (*o*) and if the insolvent dies after the assignment to the provisional assignee, and prior to the assignment to the assignees in chief, the latter will nevertheless, under the assignment from the provisional assignee, take all the property assigned to such provisional assignee. (*p*)

The provisional assignee has no option, but must be considered to have accepted the property assigned to him by the insolvent. (*q*)

But the ultimate assignees have an option whether they will take the estate or not, and have a right to a reasonable time to

(*n*) *Sims v. Simpson*, 1 Bing. Car. & P. 593.

N. C. 307. 1 Scott, 177.

(*p*) *Willes and another v. Elliott*,

(*o*) *Doe dem. Palmer v. Andrews*, 4 Bing. 392.

4 Bing. 348. 12 Moore, 601. 2

(*q*) *Crofts v. Pick*, 1 Bing. 354.

decide on it. (r) If they refuse to accept, the lessee remains liable until the lessor applies as directed by the acts.

With respect to a bankrupt also, it seems to have been fully settled, that the bankrupt would have been liable upon his express covenants, notwithstanding the assignment to his assignees, and their acceptance of the lease. (s) But now by statute 6 Geo. IV. c. 16, sec. 75, as has been already stated, (t) if the assignees accept the lease he is altogether discharged; or if they decline so to do he shall not be liable, in case he deliver up the lease to the lessor within fourteen days after he shall have had notice that the assignees have declined.

The observations before made will explain the rights and liabilities mutually subsisting between the grantee of the reversion and the assignee of the lease.

No privity
between the
lessor and un-
der-tenant.

Between the lessor and an under-tenant of the original lessee there is neither privity of estate nor privity of contract: so that as between these parties no advantage can be taken of the covenants, either in law or in deed, contained in the original lease. The lessor, therefore, cannot sue the under-tenant upon the lessee's covenant to pay rent. (u) And where there was a lease of tithes, with a covenant by the lessee for himself and his assigns, that he would not take the tithe in kind, but accept a reasonable composition not exceeding 3s. 6d. per acre, it was holden that an under-lessee was not bound by this covenant. (v)

To whom the
covenants de-
scend upon the
lessor's death.

We come next to consider how the rights of the parties stand affected by the *death*, I. of the lessor, II. of the lessee.

(r) *Lindsay v. Limbert*, 2 C. & P. 526. 12 Moore, 205. *Topham v. Dent*, 6 Bing. 513. 4 Moore & P. 264.

(s) *Auriol v. Mills*, 1 H. Bl. 433. affirmed on error, 4 T. R. 94. See also *Mayor v. Steward*, Burr. 2439. *Wadham v. Marlow*, 8 East, 314. n. (c). *Fletcher v. Bathurst*, 7 Vin.

Abr. 71. *Cantrel v. Graham*, Barnes, 69. *Ludford v. Barber*, 1 T. R. 86. *Banister v. Scott*, 6 T. R. 489.

(t) *Supra*.

(u) *Holford v. Hatch*, Dougl. 183. *Vide Goddard v. Keate*, 1 Vern. 87. *Webber v. Smith*, 2 Vern. 103.

(v) *Brewer v. Hill*, Anstr. 413.

I. 1. When the lessee has broken a covenant *in the lessor's lifetime*, and then the lessor dies, the only person who can sue for the breach of covenant is the lessor's executor or administrator, who will be able to bring his action for such breach of covenant in his testator's lifetime for damage done to the real estate, without shewing that such damage created also a damage to the personal estate, as for breach of covenant, not to fell, stub up, lop, or top timber trees excepted out of the demise. (*w*) And so where the covenant is merely personal, whether it were broken before or after the lessor's death. (*x*)

The executor.

2. But if the lessee break a covenant running with the land after the death of the lessor, the proper person to take advantage of this covenant is the person to whom the reversion descends, whether such person be named or not in the covenant; *viz.*, if it be the reversion of a freehold estate, the heir; if of a term, the executor or administrator; or where, in either case, the lessor has devised the reversion, the devisee: for as the reversion descends to him, it is fit that he have the benefit of the covenants made in respect thereof. As if the lessee covenant not to erect a mill upon the land, and he erect one, the heir of the lessor may sue him upon his covenant. (*y*) And although the rent be reserved during the term to the lessor, (tenant in fee,) *his executors and administrators*, the heir may sue for arrears accruing due *after* the ancestor's death. (*z*) In like manner, where the lessee covenants with the lessor, (tenant in fee,) *his executors and administrators*, to repair, the heir may sue for a breach of covenant incurred after the ancestor's death. (*a*) And where the breach of covenant occasions a continuous injury to the estate, the heir may sue, although the breach of covenant were committed in the time of the ancestor;—as where the lessee breaks his covenant to repair in the

Heir or devisee.

(*w*) *Raymond and another executors of Walford v. Fitch*, 2 C., M. & R. 588.

(*z*) *Sacheverell v. Frogatt*, 2 Saund. 367. S. C. 2 Lev. 13.

(*a*) *Lougher v. Williams*, 2 Lev. 92. *Glover v. Cope*, Skin. 305.

(*x*) *Fitz. N. B.* 145. (*D.*) 146. (*C.*) 92. *Ibid. n. (a.)* Co. Lit. 385. *b.*

ancestor's time, and leaves the premises unrepaired in the time of the heir, the heir may assign a breach for not repairing in his ancestor's, as well as in his own time. (*b*)

Where there was a covenant to do all reasonable acts for further assurance upon request, and the ancestor requested the covenantor to levy a fine, which he refused to do, and after the ancestor's death the heir was evicted, the Court of Common Pleas held that the heir might maintain covenant against the covenantor, upon the request made by the ancestor. (*c*)

Where a condition has been broken, either in the lifetime, or after the death, of the lessor, the proper person to *enter* for breach of the condition is he to whom the reversion descends upon the death of the lessor. (*d*)

Where a lease for twenty-one years contained a proviso that it should be lawful for the lessor or lessee, or either of them, *his executors and administrators*, to determine the tenancy in seven or fourteen years, by giving twelve months' notice to the other, his heirs, executors, or administrators, and it was contended that this being a condition calculated to defeat an estate, ought to be construed according to the very words, which merely extended the power of putting an end to the tenancy to the parties, their executors and administrators, the Court held that a *devisee* of the lessor was within the proviso; that the words, executors and administrators, were put for *representatives* in general; and that a notice might be given by the *assignee* of either party, or by the *heir* or *devisee* (the *hæres factus*) of the lessor, as well as by the parties themselves. (*e*)

Who bound
by the lessor's
covenants.
The heir.

On the other hand, if the lessor be guilty of a breach of covenant, whether running with the land or not, his heir will

(*b*) *Vivian v. Champion*, 1 Salk. 141. S. C. *Ld. Raym.* 1125. *Holt*, 178.

(*c*) *King v. Jones*, 5 Taunt. 418.

(*d*) *Co. Lit.* 215. *a.* 1 *Roll. Abr.* 857. l. 45, 50, 858. l. 5.

(*e*) *Roe dem. Bamford v. Hayley*,

12 East, 464.

be liable, in respect of any assets he may have by descent, provided the lessor have covenanted for himself "and his heirs:" (*f*) if the covenant do not name the heir, (*g*) or if, being named, the heir have no assets, he cannot be charged for any breach committed by his ancestor. (*h*) But the executor or administrator, whether he be named or not, will be liable, as far as he have assets, for the breach of any covenant running with the land in the time of the testator; and for the breach of any personal covenant, whether broken before or after the testator's death. The executor.

By 1 Wm. IV. c. 47, devisees are made liable on specialties by bond and covenant in like manner as heirs would be by force of the statute.

For a breach of covenant running with the land after the lessor's death he to whom the reversion descends will be liable, whether he be heir, executor, or devisee. (*i*) But the devisee may disclaim by mere deed and without matter of record. (*k*)

II. Upon the death of the lessee, his executor or administrator may sue upon the covenants which have been broken during the lessee's lifetime, whether they were such as run with the land, or merely collateral. To whom the covenants descend upon the lessee's death. The executor.

Where, therefore, A. having granted to B. a lease for years, covenanted that at the end of the term he would make a lease to B. and his assigns, for twenty-one years, to commence from the expiration of the first term, and B. dying during the first term, A., upon its expiration, refused to grant a further lease, it was adjudged that an action was maintainable upon the covenant by the executor of B. (*l*)

(*f*) *Dyke v. Sweeting*, Willes, 585.

(*g*) *Anon.* Dyer, 14. *a.* pl. 69. Shep. Touch. 178.

(*h*) *Gifford v. Young*, Lutw. 287, 296.

(*i*) *Swan v. Stransham & Searles*, Dyer, 257. *a.* *Andrew's case*, 2 Leon.

104. Com. Dig. *Covenant*, (C. 2.)

(*k*) *Townson v. Tickell*, 3 B. & A. 31. *The King v. Wilson*, 10 B. & C. 80, *et vide* *Stacey v. Elph*, 1 Myl. & K. 195.

(*l*) *Chapman v. Dalton*, Plowd. 284. *a.*

And where A. covenanted with B. his heirs and assigns, that B. should enjoy the lands against all persons claiming under C., and D. claiming under C., entered upon and ousted B., it was holden that the eviction being in the lifetime of B., when he had neither heir nor assignee, the executor was the proper person to sue as the personal representative of the testator, although he was not named in the covenant. (*l*)

It appears, however, from a modern decision, that in order to give the personal representative a right to sue, not only must the breach of a covenant happen in the lifetime of the testator, but the damage arising therefrom must also accrue in his lifetime. For where A. covenanted with B., that he had a good title to convey, whereas he had no title, and B. dying in possession, his executor brought an action for the breach of covenant, the Court of King's Bench held that the action was not maintainable by the executor; for no actual damage having accrued to the testator in his lifetime, and he, having omitted to sue, the right of action passed at his death, together with the lands, to his heir or devisee. (*m*)

The executor of an executor may sue for a breach of covenant with the first testator, (*n*) and the executor of an executor is liable to be sued for a breach of the first testator's covenant by the first executor. (*o*)

The heir. If the lessee's estate be a mere chattel interest, the term will vest, upon his death, in his executor or administrator, who may take advantage of any breach of covenant incurred after the lessee's death. But if the heir be entitled to the lessee's interest, (as in the case of the death of tenant *pur*

(*l*) *Lucy v. Levington*, 2 Lev. 26. S. C. 1 Ventr. 176. 2 Keb. 831.

(*m*) *Kingdon, Executrix, v. Nottle*, 1 M. & S. 355. *Kingdon v. Nottle*, 4 M. & S. 53, where the action was holden to be well brought by the plaintiff as devisee. It seems that had a special breach been as-

signed, and damages recovered by the executor, the heir would have been barred from maintaining another action for the same breach. 1 M. & S. 364.

(*n*) *Chapman v. Dalton*, Plowd. 284. *a*.

(*o*) *Belcher v. Sikes*, 8 B. & C. 165.

outré vie, living *cestui que vie*,) the heir alone can take advantage of the covenants running with the land ; though the executor will still be entitled to sue for breach of collateral covenants. Where the lessee devises his estate, the devisee will stand in the place of the heir in case the estate were *pur autre vie*, or of the executor in respect of covenants running with the land, in case the estate devised were only a chattel interest ; the executor still remaining entitled to sue for breach of collateral covenants. (*p*)

The devisee.

Upon the death of the lessee, for breach of all covenants in his lifetime, his heir, *if he be named*, will be liable in respect of any assets that may descend to him : (*q*) as will also the devisee, (*r*) and so the executor or administrator will be liable in respect of the assets, whether he be named or not, unless it be such a covenant as could only be performed personally by the covenantor, and therefore expires upon his death. (*s*) Upon a covenant in law the executor will not be liable, after the determination of the estate, concerning which the covenant is made. Where therefore A., tenant for life, with remainder to B. in fee, demised by indenture to C. for fifteen years, and then died, upon which B. entered upon C., the Court held that C. could not charge the executor in an action upon the covenant in law, because the covenant determined by the death of the tenant for life ; though they agreed it would have been otherwise upon an *express* covenant for quiet enjoyment. (*t*)

Who bound by the lessee's covenants.

The heir, or executor in respect of assets :

Where two lessees covenant jointly and severally, such covenant binds the executor of the lessee first dying as well as the surviving lessee. (*u*) And so the executor, &c., of the exe-

(*p*) *Ibid.* Co. Lit. 209. *a*.Dyer, 324. *a*. pl. 34.(*q*) Anon. Dyer, 14. *a*. pl. 69. Gifford v. Young, Lutw. 296.—Shep. Touch. 178.(*t*) Swan v. Stransham, Dyer, 257. *a* S. C. 1 And. 12. Moore, 74. Bendloe's Rep. 150. And see Evans v. Vaughan, 4 B. & C. 261.(*r*) *Supra*, p. 232.(*s*) *Ibid.* Hyde v. Dean, &c. of Windsor, Cro. Eliz. 552. Anon.(*u*) Envys v. Donnithorne, Burr. 1190.

cutor *ad infinitum* of the deceased covenantor, or his assignee, will be bound by the covenants, in respect of assets. (u)

And as the lessee continues liable, upon his express covenants, notwithstanding an assignment, (v) so the executor or administrator will not be discharged by the lessee's having assigned his interest in his lifetime, or by his own assignment after the lessee's death. (w)

or if they enter
as assignees.

Though, upon the covenants of the lessee, the heir, in case he be named, and the executor and administrator, whether named or not, are chargeable before entry in respect of assets only; yet, if they enter into the land demised, they then become chargeable as assignees in respect of privity of estate for future breaches of covenant, and for such will be liable *de bonis propriis*: (y) for they are then charged in respect of the perception of the profits, and it is immaterial whether they have assets or not. In such a case, however, if the land be of less value than the rent, they may plead the special matter, *viz.*, that they have no assets, and the land is of less value than the rent, and pray judgment whether they shall be charged otherwise than in the *detinet* only. (z) And a mere experiment as to the premises being beneficial to the estate will not bind an executor; accordingly, in one case, where an executor took possession and kept them eight months, and then finding them unproductive, made a verbal offer to the landlord to surrender them, the Court of Common Pleas held that the executor was not liable to be sued in the *debet* as an assignee. (a) But whether he enter or not, he is

(u) Spence's case. 5 Rep. 17. 7th Resolution. Chapman v. Dalton, Plowd. 284. a.

(v) *Supra*, p. 327.

(w) Brett v. Cumberland, Cro. Jac. 521. Bachelour v. Gage, Cro. Car. 188. Hornby v. Houlditch, Andr. 40.

(y) Tilney v. Norris, Ld. Raym.

553. S. C. Carth. 519. 1 Salk. 309. Derisley v. Custance, 4 T. R. 75. And see *post*, Book IV.

(z) Billingham v. Spearman, 1 Salk. 297, 317. Jevens v. Harridge, 1 Saund. 1. n. 1

(a) Remnant v. Bremridge, 8 Taunt. 191.

still chargeable in the *detinet*, because he cannot so waive the term as not to be liable so far as he has assets. (b)

Although an executor, who has occupied premises held by his testator under a lease, with covenants for payment of rent and taxes and to repair, being sued in covenant as *assignee* in respect of the privity of estate, is liable on the covenant for rent and taxes to the amount of profits only; yet for a breach of the covenant to *repair*, he is liable to the same extent as any other assignee. (c)

Upon the whole, the relations of the parties to each other may be thus shortly stated. The lessor and lessee are reciprocally bound to each other for the covenants *in law*, by privity of *estate*; for the covenants *in deed*, by privity of *contract*. When the lessor *grants his reversion*, the privity of estate is thereby transferred to the grantee; and the privity of contract, in respect of such covenants as run with the land, is also transferred by force of the statute 32 Hen. VIII. c. 34. When the lessee *assigns his estate*, the privity of estate is transferred to the assignee; the lessee still remaining liable upon his privity of contract. When the lessor or lessee dies, the covenants running with the land devolve upon the person to whom the land passes: and such covenants as are merely collateral devolve upon the executor.

(b) *Hellier v. Casebert*, 1 Lev. 172.

(c) *Tremeere v. Morrison*, 4 Moore & S. 603. 1 Bing. 89, N. S.

BOOK THE THIRD.

OF DISSOLVING THE RELATION OF LANDLORD AND TENANT.

CHAPTER THE FIRST.

*Of the several means of dissolving the Relation of
Landlord and Tenant.*

The tenancy
may be deter-
mined,

THE relation of landlord and tenant may be determined by the death of tenant for life or *cestui que vie* ; by the happening of any other event upon which the lease is limited ; by effluxion of time ; by notice to quit ; by forfeiture ; by merger ; or by surrender.

I. By death :

I. Where the lease is for the life of the lessor, or of the lessee, or of a stranger, the tenancy is *ipso facto* determined by the death of him upon whose life the lease depends. (a)

So a lease of glebe land by the incumbent determines by his decease. (b)

II. By condition in law :

II. Where a lease is made for life or years subject to be defeated by the happening of a particular event, the happening of such event *ipso facto* determines the tenancy. (c)

III. By effluxion of time :

III. By effluxion of time.

(a) *Ludford v. Barber*, 1 T. R. 95. Ry. & Moo. 237.

(b) *Doe dem. Kirby v. Carter*, (c) *Supra*, p. 134.

Where a lease is made for a certain definite term, the tenancy will expire with the term.

In all these cases, notice to quit will not be necessary in order to dissolve the relation of landlord and tenant. (*d*)

IV. By notice to quit.

IV. By notice to quit.

If a party is holding as tenant *at will*, a slight circumstance will amount to a notice to him to quit, as a letter informing him unless he pays what is due, immediate measures will be taken to recover possession. (*e*)

Where premises are leased for life, or for years, determinable previously to the regular expiration of the lease, as in the case of a lease for twenty-one years, determinable at the end of three years, a notice to quit is necessary, to determine the tenancy. (*f*)

Where the lease is made to be determinable.

In the case of a tenancy from year to year, the relation of landlord and tenant cannot be regularly determined but by notice to quit, (*g*) or by surrender in writing, or by surrender in law. (*h*) The death either of the lessor or lessee does not put an end to the interest; but in the latter case it passes to the personal representative of the lessee. (*i*)

Where the tenancy is from year to year.

It becomes, therefore, necessary to inquire :

1. In what cases a tenancy from year to year is created so as to require a notice to quit.

(*d*) *Cobb v. Stokes*, 8 East, 358.

the landlord, see *ante*, p. 123.

(*e*) *Doe dem. Price v. Price*, 9 Bing. 356.

(*g*) Year Book, 13 Hen. VIII.

15. *b. Layton v. Field*, 3 Salk. 222.

Right dem. *Flower v. Darby*, 1 T. R. 159, 163.

(*h*) *Doe dem. Read v. Ridout*, 5 Taunt. 519.

(*i*) *Doe dem. Shore v. Porter*, 3 T. R. 13. *James v. Dean*, 11 Ves. 393.

(*f*) *Messenger v. Armstrong*, 1 T. R. 54. See *Legg v. Benion*, Willes, 43, and *Denn dem. Jacklin v. Cartright*, 4 East, 29. That it is in the option of the tenant only to determine such tenancy, where the power is not expressly given to

2. At what time the notice must be given.
3. By whom it must be given.
4. To whom it must be given.
5. Its form and direction.
6. The service of the notice.
7. What acts amount to a waiver of notice.

1. Notice to quit is necessary,

Where the remainder-man receives rent after tenant for life's death.

1. It has been shewn, that when tenant for life makes a lease and dies, the estate of his lessee is at end, so that the remainder-man may oust him without any notice. But if the remainder-man receive rent from the lessee, or otherwise adopt him as his tenant, a tenancy from year to year is thereby created, and a notice to quit will be necessary in order to put an end to it. (*k*)

Thus, in an action of ejectment by T. M. for certain premises, it appeared that one J. M., being tenant for life, with power to make leases for *twelve* years, remainder to T. M. in tail, made a lease to S. for *twenty-one* years, and died in the middle of a quarter. The agent of T. M. received the rent from the defendant, who was the assignee of S. It was not disputed but that the lease was void *at law*, not having been made pursuant to the power: but the defendant relied upon the acceptance of rent as an admission of a tenancy from year to year. And of this opinion was *Hotham*, B., who tried the cause; for he held that the lessor of the plaintiff could not now treat the defendant as a trespasser, having received rent of him. And this opinion was afterwards confirmed *in banc*. (*l*)

(*k*) Sykes dem. *Murgatroyd v. Birkitt*, cited 1 T. R. 161. Doe dem. *Jordan v. Ward*, 1 H. Bl. 97. That the lease expires with the death of tenant for life, and cannot be set up by the acts of the

remainder-man, *vide ante*, pages 30 and 211, and Doe dem. *Potter v. Archer*, 1 B. & P. 531.

(*l*) Doe dem. *Martin v. Watts*, 2 Esp. N. P. 501. S. C. 7 T. R. 83.

Where an estate, the greater part of which was in lease, either for years certain not exceeding twenty-one, or for longer terms of years determinable on lives, was settled on several tenants for life in succession, with remainders in tail; with power to every tenant for life, "when he should be in the actual possession of the same, or any part thereof, from time to time, by indenture, to make leases of all or any part or parts of the demesne lands, whereof he should be in the actual possession, for any term or number of years not exceeding twenty-one years, or for the life or lives of any one, two, or three person or persons: so as no greater estate than for three lives were at any one time in being at any part of the premises; and so as the ancient yearly rent, &c., were reserved." One of the tenants for life made a lease which was unauthorized by the power, and consequently void as against the tenant in tail in remainder: but it being found by special verdict that the tenant in tail had received the rent reserved by such lease accruing after the death of the tenant for life who made it, the Court of King's Bench held that the receipt of rent was evidence of a tenancy, the particular description of which it was for the jury to decide upon. They intimated, however, that, under the circumstances of the case, and the disparity of the rent reserved, being 4*l.* 2*s.*, while the rack-rent value was 60*l.* a-year; (though one of the lessees had been presented by the homage as tenant after the death of the tenant for life, and admitted by the lord's steward; and the 4*l.* 2*s.* reserved was more than the ancient rent;) a jury would be strongly advised to decide against a tenancy from year to year: but had the jury in this case determined that the tenancy was a tenancy from year to year, a notice to quit would have been necessary to its dissolution. (n)

But where, under a grant by copy of court roll of a reversionary estate to A., *habendum* to him for the lives of B. and C., his grandsons, during the life of either of them

(n) *Roe dem. Brune v. Prideaux*, 10 East, 158. *Rawlins, ibid.* 261, *et vide Whiteacre dem. Boulton v. Symonds*, 10 East, 13.

longest living, successively, according to the custom, &c., reserving a heriot and 6s. rent, in consideration of the fine paid by the grandfather, the lord suffered the first in succession of the *cestuis que vie* to enter as tenant upon the death of his grandfather, and received the 6s. rent from him till his death; the Court of King's Bench held that such receipt of rent from the *cestui que vie* did not constitute a tenancy from year to year, so as to entitle his widow to notice to quit; the rent not being received as between landlord and tenant, but attributable to another consideration. (o)

So where A. agreed to let her house to B. "*during her life, supposing it to be occupied by B. or a tenant agreeable to A.;*" and "*a clause was to be added in the lease*" to give A.'s son an option to possess the house when of age; the Court held, that this being only an agreement for a lease, and not a perfect lease, a lease granted in pursuance of such agreement would only enure for the joint lives of A. and B.; and therefore that B. having continued in possession of the premises under the agreement to the time of his death, his interest then determined, and that A. might maintain ejectment against B.'s executrix, who had possessed herself of the premises, without any notice to quit. (p)

In the case of *Doe v. Watts*, a *nisi prius* decision was cited, where A., the husband of B., who was seised of the premises being copyhold, without his wife's consent, in 1780, granted a lease to the defendant for forty-one years at a small rent. The husband received the rent during his wife's life, and after her death until 1788; and after the death of the husband, the daughter, who was lessor of the plaintiff, *not knowing the invalidity of the lease*, received rent to Lady-day, 1789. Whereupon, *Gould, J.*, who tried the cause, ruled that no notice was necessary. (q) But *Lawrence, J.*, observed, that the lessor could not be allowed to take

(o) Right dem. Dean and Chapter of Wells v. Bawden, 3 East, 260.

6 East, 530.

(p) Doe dem. Bromfield v. Smith,

(q) Doe dem. Adeane v. Prentice, Surry Lent Assizes, 1790.

advantage of his ignorance of his own title. When the lease became void, the lessee became a trespasser, and as such might have been turned out of possession. But the lessor, having by his own act admitted the defendant as his tenant, could no longer consider him as a trespasser, and had therefore made a notice necessary. (r)

Where the tenant enters under an intended demise for life or years, which cannot take effect as such, but merely as a tenancy from year to year, such tenancy must be determined by a notice to quit. Where, therefore, a demise was made *for so long a time as the tenant did not carry on a particular trade*, the Court held this to be a mere tenancy from year to year, and that a notice to quit was necessary; because it could not operate as a lease for life, there having been no livery; nor as a term, it being for no definite period. (s)

Where tenant enters under an inoperative lease,

Where a sale of land is agreed upon, and the owner of the lands puts the intended vendee into possession, he cannot oust him without a notice to quit, or at least a demand of the possession. (t) And so where an agreement was made between A. and B., that A. should sell certain premises to B., if it turned out that A. had a title to them, and that B. should have the possession from the date of the agreement; the Court held, that A. could not eject B. without a demand of possession; and they were of opinion that the service of a declaration in ejectment was not equivalent to a demand, because an ejectment treats the party in possession as a wrong doer; and in the present case, the defendant had entered with the license of the plaintiff. (u)

or under an agreement to purchase.

Declaration in ejectment not equivalent to demand.

It has been recently decided, that a party in possession, under an agreement to sell, is a strict tenant at will, so that

(r) 7 T. R. 86.

13 East, 211.

(s) Doe dem. Warner v. Browne,

(u) Doe dem. Newby v. Jackson,

8 East, 165, *et vide supra*, p. 78.

1 B. & C. 448.

(t) Right dem. Lewis v. Beard,

a feoffment with livery on the land will determine the tenancy whether the party be on or off the land. (v)

or to lease.

Where a party occupies, under an agreement for a lease, during the whole term for which the lease was to be granted, a notice to quit is not necessary at the end of the term, as the agreement marks the expiration, as well as the other terms of the tenancy. (w)

In *Hegan v. Johnson*, where the actual question was whether, under an agreement for a lease, the lessor could distrain for rent during the *first year*, the Court held, that where a party is put into possession under an agreement to take a lease, without any absolute demise, and a lease is afterwards tendered to him, which he refuses to accept, the owner may eject him without notice to quit, (x) unless there is a stipulation that in case no lease is executed, he shall hold for one year certain. The effect was, that the landlord could not distrain, but must bring his action. This decision is not very reconcilable with *Right v. Beard*, *Doe v. Jackson*, and *Bull v. Cullimore*, inasmuch as it seems to have denied that the possession amounted even to a tenancy at will, which those cases distinctly admitted. (y)

Where the vendor of a term, before the whole purchase-money was paid, agreed with the vendee that he should have possession of the premises till a given day, paying the reserved rent in the meantime; and that, *in case he did not pay the residue of the purchase-money on that day*, he should forfeit the portion he had already paid, and not be entitled to an assignment of the lease; Lord *Ellenborough*, C. J., held, that this agreement operated like a

(v) *Bull v. Cullimore* and others, 106, *et supra* 350.
2 C., M. & R. 120.

(x) *Hegan v. Johnson*, 2 Trut.

(w) *Doe dem. Tilt v. Stratton*, 4

148.

Bing. 446, *et vide* *Doe dem. Bloomfield v. Smith*, 6 East, 520. *Doe dem. Oldershaw v. Breach*, 6 Esp.

(y) *Et vide* Watk. Convey. 7 edit. p. 22.

clause of re-entry on a breach of covenant in a lease, and that the residue of the purchase-money not being paid upon the appointed day, the vendee's interest thereupon ceased, and he might be ejected without any notice to quit. And his lordship likewise thought that the circumstance of interest being afterwards received upon the instalments remaining due, was no recognition of the tenancy. (y)

A man got into possession of a house without the privity of the landlord; however, they afterwards entered into a negotiation for a lease, but disagreed about the valuation of the fixtures. The landlord having brought an ejectment against him, it was objected for the defendant that a notice to quit was necessary. But Lord *Ellenborough* said, that if this was a tenancy of any sort, it was a tenancy at sufferance, and a notice to quit was unnecessary. (x)

It is a privilege of the mortgagee, unless there is an actual agreement to the contrary, that he may evict the mortgagor from the possession without notice or demand. (a)

But if in the mortgage deed, there is a proviso for the enjoyment of the land by the mortgagor, and his heir, until default in payment on a given day, &c., and the mortgagor is in actual possession, he may, under the agreement, be regarded as tenant for years to the mortgagee during the time given for payment. (b) If, in the case of such agreement, the money is not paid at the appointed time, and the mortgagor continues in possession without any fresh agreement between the parties; or if the mortgage debt contains no such agreement, he may be considered as tenant at sufferance or treated as a trespasser; (c) although the mortgagee has been in the

(y) Doe dem. Leeson v. Sayer,
3 Campb. 8.

(z) Doe dem. Knight v. Quigley,
2 Campb. 505.

(a) Doe dem. Roby v. Maisy,
8 B. & C. 767. 3 M. & Ryl. 109.

Doe dem. Fisher v. Giles, 5 Bing.
421.

(b) Powsley v. Blackman, Cro.
Jac. 659. Wilkinson v. Hall, 3
Bing. 508.

(c) Doe v. Maisy, *supra*.

receipt of interest on the mortgage debt; (*d*) and in every case, except where there is a continuing agreement for the actual occupation of the mortgagor for a given period, the continuance of the mortgagor in possession, if with the consent of the mortgagee, may be construed strictly as a tenancy at will. (*e*) If the mortgage is transferred to another, the mortgagor will become tenant at sufferance to the assignee. (*f*)

Notice to quit
is necessary
notwithstanding
the death
of the parties;

It seems to have been formerly questioned, whether the death of the lessee would not put an end to the tenancy from year to year. (*g*) But this question is now fully set at rest; and it is settled that the executor or administrator, having the same interest as the testator or intestate, the same means of dissolving the tenancy must be resorted to. So that notwithstanding the death either of the lessor or of the lessee, the tenancy still continues; and a regular notice to quit on one side or the other is necessary to its dissolution. (*h*)

Accordingly, where a tenant died intestate, in the possession of certain premises, and his widow, after continuing to occupy them for several years, and paying rent to the landlord, married a second time, and her second husband entered into possession, and paid rent for several years to the landlord; and upon the death of the wife, the personal representative of the first husband obtained administration of his estate and effects, and brought an action of ejectment to evict the second husband; it was held that the defendant must be considered to have occupied the premises as agent for the personal representative, who had a right to an end to

(*d*) Doe dem. Rogers v. Cadwallader, 2 B. & Ad. 473, *et vide* Doe dem. Whitaker v. Hales, 7 Bing. 322.

(*e*) Keech v. Hall, 1 Doug. 22. Partridge v. Bere, 5 B. & A. 604, *et vide* Birch v. Wright, 1 T. R. 378. Moss v. Gallimore, Doug. 22.

(*f*) Smartle v. Williams, 3 Lev.

387, and 1 Salk. 245. Thunder v. Belcher, 3 East, 449.

(*g*) Gulliver dem. Tasker v. Burr, Bl. Rep. 596.

(*h*) Parker dem. Walker v. Constable, 3 Wils. 25. Doe dem. Shore v. Porter, 3 T. R. 13. Rex v. Inhabitants of Stone, 6 T. R. 295.

that agency as soon as he thought proper, and that the action was maintainable without a notice to quit. (i)

Where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving him the same notice to quit as the original lessor would have been bound to do. (k)

though the
reversioner be
an infant.

An ejectment was brought, in which the demise was laid to be by P. M., who was then an infant. The action was however settled, it being agreed between the attorney of P. M. and the tenant, that the tenant should pay 100*l.* for the rent in arrear, and attorn to P. M. When P. M. came of age, he brought another ejectment against the tenant; and insisted that he had a right to treat him as a trespasser, having proved a title in himself, and having done no act confirmatory of the agreement so as to create a tenancy. The tenant did not prove that he had paid any rent; but contended that the attornment being made in pursuance of the agreement, he was entitled to a notice to quit. Lord *Kenyon* said, “ he considered the agreement binding in equity, and capable of being there enforced; and although the infant was neither a party to the agreement, nor had confirmed it, the agreement having been entered into after an ejectment brought at his suit, he was of opinion that he had established the defendant’s title as against himself, and that a new tenancy was thereby created, and the defendant could not be considered as a trespasser. Therefore a notice to quit not having been given, the plaintiff should be nonsuited. His lordship, however, added, that had there appeared any thing fraudulent in the bringing of the first ejectment, or in the agreement entered into under it he should have ruled that the defendant should have no benefit from it: but as no such thing had appeared, he should nonsuit the plaintiff. (l)

(i) *Doe v. Bradbury*, 2 D. & R. 2 T. R. 159.

706.

(l) *Doe dem. Miller v. Noden*,

(k) *Maddon dem. Baker v. White*, 2 Esp. N. P. 530.

But not where the tenant enters after the title of the reversioner accrues.

A notice to quit is unnecessary where the tenant has come into possession subsequently to the accruing of the title of the lessor of the plaintiff, and without his consent. As where a judgment had been recovered in 1808, upon which an inquisition issued in 1818, and in 1817 the tenant came into possession, the Court held that no notice was necessary, the land being bound from the time of the judgment. (m)

Nor where tenant disclaims his landlord.

So, where the tenant has attorned to any other person, or has done any act disclaiming his tenancy, or in any way put his landlord at defiance, the landlord may consider him a trespasser, and need not give him notice to quit. (n) But the disclaimer must be prior to the day laid in the ejectment. (o)

Where the defendant in ejectment came into possession of the premises, for which the action was brought, as tenant to D. M., who devised the same to the lessors of the plaintiff upon certain trusts ; and the will being long contested, the tenant, doubting whether the will was duly made, refused to pay the rent to the lessors of the plaintiff, professing, however, that he was ready to pay it to any person entitled to receive it : and, having actually paid part of it to a man who had collected rents for D. M. in his lifetime, Lord *Kenyon*, C. J., ruled, that this was no disavowal of the title of the lessors of the plaintiff, and that the tenant was entitled to notice to quit. (p)

Nor is it necessary, in case of adverse possession, to give the tenants in possession notice to quit : as where a party defended an action of ejectment, as landlord, and the occupiers suffered judgment by default, the defendant could not object that the tenants in possession had not received notice to

(m) Doe dem. Putland v. Hilder, 2 Barn. & Ald. 782.

(n) Doe dem. Grubb v. Grubb, 10 B. & C. 816. Doe dem. Whittock v. Jefferies, Gow. 195. Doe dem. Whitehead v. Pittman, 2 Nev. & M. 673. Doe dem. Dillon v.

Parker, Gow, 180. And see Throgmorton v. Whelpdale, Bull. N. P. 96.

(o) Doe dem. Lewis v. Cawdor, 1 C., M. & R. 398.

(p) Doe dem. Williams v. Pasquali, Peake, N. P. 259.

quit from the lessors of the plaintiff, who claimed adversely to the party under whom the tenants occupied. (*q*)

In a late case, where the defendant, who held under a tenant for life, received on her death a letter from the lessor of the plaintiff, claiming as heir-at-law of the person who had devised the premises to the deceased tenant for life and demanding rent; whereupon the defendant wrote in answer, that he held as tenant to J. S. (the husband of the late tenant for life) in right of his wife; that he had never considered the lessor of the plaintiff as his landlord; that he should be ready to pay the arrears to any person who should be proved to be either heir-at-law, or otherwise entitled to receive it; but that, without disputing the pedigree of the lessor of the plaintiff, he must decline taking upon himself to decide upon the claim made on him, without more satisfactory proof in a legal manner: it was held that this letter amounted to a disclaimer of the title of the heir-at-law, and that he might maintain ejectment against the tenant without giving him previous notice to quit. (*r*)

On the other hand the necessity of giving notice upon the part of the tenant, will be dispensed with by the landlord's accepting another person as tenant, in his room, (*s*) or by doing an act amounting to an assent to the determination of the tenancy: as where the landlord, in the middle of a quarter, accepted from his tenant the key of the house which had been demised under an agreement that, upon the tenant's giving up possession, the rent should cease. (*t*) But in an action for use and occupation of apartments in the plaintiff's house during half a-year, where it appeared that the tenant had quitted the premises, but had neglected to give a notice to quit, and the defence set up was, that the plain-

Nor where the lessor accepts a new tenant.

(*q*) Doe dem. Cheese v. Creed, 2 Moore & P. 648, *et vide* Doe dem. Foster v. Williams, Cowp. 622.

(*r*) Doe dem. Calvert v. Frowd, 4 Bing. 557.

(*s*) Sparrow v. Hawkes, 2 Esp.

N. P. 504, *et vide* Walls v. Atcheson, 3 Bing. 462, Grimman v. Legge, 8 B. & C. 224, Selwyn, N. P. 9 edit. 1421, *et infra*.

(*t*) Whitehead v. Clifford, 5 Taunt. 518.

tiff, after the defendant had quitted, had put up a bill at the window, and endeavoured to let the lodgings, Lord *Kenyon*, C. J., expressed an opinion that the defence insisted on would afford no answer to the plaintiff's action: it was for the benefit of the defendant that the apartments should be let, nor would he infer from the circumstances of the party's endeavouring to let them, that the contract was put an end to; that there must be other circumstances to shew it, and not merely an act of so equivocal a kind. (u)

Where by the agreement between the parties the tenancy is to end on a precise day there is no necessity for a notice to quit. (v) And if by the terms of a deed of co-partnership a house is to be occupied by the co-partners, *during the co-partnership only*, it is not necessary, after a dissolution, to give a notice to quit previous to bringing an action of ejectment against one who had been co-partner. (w)

But if the landlord receive rent, accruing after the expiration of the lease, his receipt will bar him from contending that the tenancy is at an end, and a notice to quit will then be necessary. And so on the other hand where A., who held premises under a lease which expired at Midsummer, refused to give up the possession at that time, and insisted upon notice to quit, and afterwards continued in possession till Christmas, and paid rent: it was held, that this was conclusive evidence of a tenancy, and that the landlord was entitled to recover a quarter's rent due at Lady-day. (x)

If land be in lease to tenant for years, who underlets part to tenant from year to year, and the latter holds on after the determination of his lessor's interest, and pays a quarter's rent to a new tenant for years; this is not sufficient evidence

(u) *Redpath v. Roberts*, 3 Esp. 225. *et vide infra*, p. 344.

Recognised by Lord Ellenborough in *Mills v. Bottomley*, cited Selw. N. P. 9 edit. 14, 21.

(v) *Cobb v. Stokes*, 8 East, 358. *Messenger v. Armstrong*, 1 T.R. 54,

(w) *Doe dem. Waithman v. Miles*, 1 Stark. 181.

(x) *Bishop v. Howard*, 2 B. & C. 100. *Fell v. Wilson*, 12 East, 83.

of a new tenancy from year to year to entitle the new tenant for years to notice to quit; for the fact relied on, admits equally of a different consideration, *viz.*, a taking for a single quarter. (y)

Under the Tithe Commutation Act, (x) tithes in England and Wales will be commuted into rent-charges, and by the eighty-eighth section, lessees are authorized to surrender their leases, and provision is made for mutual compensation. Questions, therefore, in respect of the determination of composition for tithes can rarely arise. The following cases arose on the law as it stood before the passing of the Commutation Act.

In the case of a composition for tithes between the parson and the farmer, without any particular period being specified for which the composition was to last, it was decided that a notice must be given by the party intending to determine the composition, in the same manner as in the case of a tenancy of lands from year to year. (a) If, therefore, a composition for tithes was made by A. as proprietor, and he leased them to B., whose interest was afterwards put an end to by A., before any alteration was made in the composition, A. could not determine it without half a-year's notice. (b) Where, however, the bargainee of tithes for one year underlet them to the several occupiers of the land, no notice to determine the underletting by another bargainee of the same tithes for the following year was required. (c) And as a composition was determined by the death of the incumbent, no notice was necessary from the successor, unless he adopt the composition. (d) But if a person who held under a former incumbent continued in possession under his successor, without

To determine
a composition
for tithes.

(y) *Freeman v. Jury*, Mood. & Mal. 19.

(z) 6 & 7 Wm. IV. c. 71.

(a) *Bishop v. Chichester*, Gwil. 1316. *Wyburd v. Tuck*, 1 B. & P. 548. *Doe dem. Morgan v. Church*,

3 Camp. 71. *Doe dem. Brierly v. Palmer*, 16 East, 53.

(b) *Wyburd v. Tuck*, *sup.*

(c) *Cox v. Brain*, 3 Taunt. 95.

(d) *Brown v. Barlow*, Gwil. 1001.

disturbance, he must be presumed to hold as tenant to the latter, and could not be dispossessed without a notice to quit. (*k*) Where a notice was given, it must be to determine the composition in *toto*; for it could not be determined as to part, and continued as to the rest. (*l*)

2. At what
time the notice
must be given;

2. When one year of the tenancy is run out, and a new year is entered upon, the parties have a right to hold each other to the tenancy for the whole of that year. The time, therefore, required for quitting must expire exactly with the current year. For as on the one hand neither party has a right to put an end to the tenancy before the expiration of the year; so on the other hand, if the notice overstep its expiration, a new year is entered upon, and a new right to enjoy that year arises.

in case of
tenancy from
year to year :

Where the parties are silent as to the length of the notice required, the law demands that in the case of tenancy from year to year, it should be at least *half a year*, (not merely six lunar months;) so that it may be laid down as a general rule that, in order to put an end to a tenancy from year to year, there must be half a year's notice to quit, ending at the expiration of the year; a rule that extends equally to houses, lands, tithes, &c. (*m*) But tenant from year to year, not under any agreement to repair, may quit, without notice, on the premises becoming unsafe for want of repairs, (*o*) or unwholesome for want of sufficient drainage, without great and unreasonable labour and expence in repairs. (*p*)

(*k*) Doe dem. Cates v. Somerville, 6 B. & C. 126.

(*l*) Reynel v. Rogers, Bunb. 15, *et vide* Adams v. Hewitt, 7 B. P. C. 64, *et vide* Mirehouse on Tithes, p. 200.

(*m*) Gulliver dem. Tasker v. Burr, Bl. Rep. 596. Right dem. Flower v. Darby, 1 T. R. 159. Hewitt v. Adams, 7 Bro. P. C. 64. In legal

computation half a year is 182 days, the odd hours being rejected. Anon. Dyer, 345.

(*n*) Edwards v. Etherington, 1 Ry. & M. 268. Abbott, C. J. Salisbury v. Marshall, 4 Car. & P. 615, *sed vide* Bates v. Holtzapple, 4 Taunt. 45.

(*o*) Collins v. Barrow, 1 Moo. & Rob. 112.

By the expression "half a year," this distinction must be observed, that if the tenancy expire on any of the usual feasts, the notice must be given prior to the corresponding feast, happening in the middle of a year; but if the tenancy expires on any other day in the year, the notice must be given six calendar months prior to such determination. (r)

A reservation of rent *quarterly* is no dispensation of the necessity of the half-year's notice. (s)

The length of time (*viz.* half a year,) required by the law for a notice to quit, may, however, be varied by particular local custom, or by the special agreement of the parties. Thus a custom may be shewn making a year's notice necessary; or an agreement may be set up, by which three months shall suffice. (t) Still, however, whatever be the length of the notice, it ought neither to break into the year, nor to exceed it; it having been decided that, on a letting "from year to year to quit at a quarter's notice," the quarter must expire with the current year of the tenancy, (u) unless the contrary be expressly agreed between the parties. (v)

by special custom.

The notice must end with the year,

Where the tenancy is for less than a year, as for a quarter, a month, or a week, (for which short periods lodgings are usually let,) the length of the notice must be regulated by the letting; as a month's notice for a monthly letting, and a week's notice for a weekly letting. (w) But the

or with the quarter, month, or week, according as the demise is made.

(r) Doe dem. Harrop v. Green, 4 Esp. 199. Doe dem. Duke of Bedford v. Knightley, 7 T. R. 63. 1 Chitt. 11. (b.) Roe dem. Durant v. Doe, 6 Bing. 574. 4 Moore & P. 391, *et vide* Adams on Eject. 138, 3d edit.

(s) Shirley v. Newman, 1 Esp. N. P. 266.

(t) Roe dem. Henderson v. Charnock, Peake, N. P. 7, and Tyley v. Seed, Skin. 649, in which last case it is said that, "by the custom of London, a tenant under 40s. rent, being tenant at will, shall not be turned

out without a quarter's warning; and a tenant at will, paying above 40s. *per annum*, shall not be turned out without he hath half a year's warning." And see Dethick v. Saunders, 2 Sidf. 20. Timmins v. Rowlinson, Burr. 1609, and Selwyn's N. P. 9th edit. p. 710.

(u) Doe dem. Pitcher v. Donovan, 1 Taunt. 555. S. C. 2 Camp. 78.

(v) Doe dem. Rigge v. Bell, 5 T. R. 471, and see Shirley v. Newman, 1 Esp. 266.

(w) Doe dem. Parry v. Hazell, 1 Esp. N. P. 94. Roe dem.

same principle must govern such a tenancy as governs a tenancy from year to year;—the expiration of the notice must be with the expiration of the month or week; therefore, where premises were taken under an agreement by which the “tenant was always to be subject to quit at three months’ notice,” Lord *Ellenborough*, C. J., held this to be a quarterly tenancy; and that to determine it, a quarters’ notice must be given, expiring at the same time of the year at which it commenced, *or any corresponding quarter-day.* (y) And it follows upon the same principle that where a letting is for a month determinable upon a week’s notice, the notice ought to expire with the month.

If lodgings are let at a rent payable half yearly, and after payment of the first half year’s rent, and during the next quarter, the lodger quits the possession, and at the end of the year pays up the last half year’s rent; a tenancy from year to year will not be implied, although if he had commenced a second year’s tenancy it might. (x) The inference will be, that the party considered himself tenant for one year, and no longer.

Notice to a weekly tenant to quit “at the end of his tenancy next after a week from the date of the notice” is sufficient. (a)

It has been holden at *Nisi Prius* that unless there is an usage to that effect, a weekly notice by the tenant is not necessary to determine a weekly tenancy. (b) But the better opinion appears to be, that a week’s notice is, in all such cases, necessary, unless the contrary is stipulated for.

A lodger cannot, it seems, quit without notice, merely from an apprehension (however reasonable) of his goods being distrained for his landlord’s rent. (c)

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| Peacock <i>v.</i> Raffan, 6 Esp. 4. | Right | 6 Bing. 362. |
| dem. Flower <i>v.</i> Barber, 1 T. R. 156. | (b) | Huffell <i>v.</i> Armistead, 5 C. & |
| (y) Kemp <i>v.</i> Derrett, 3 Campb. | | P. 56. |
| 510. | (c) | Rickett <i>v.</i> Tullick, 6 Car. & |
| (x) Wilson <i>v.</i> Abbott, 3 B. & C. 88. | | P. 66. |
| (a) Doe dem. Campbell <i>v.</i> Scott, | | |

Since the notice must expire with the year, month, &c., it is always necessary to be accurate in ascertaining the time at which the tenancy commenced.

At what times the tenancy shall be considered as beginning and ending.

In general the tenancy will be taken to commence from the day of the tenant's entering, and not with reference to any particular quarter-day: and, therefore, where a quarterly tenant entered on the 29th of October, Lord *Ellenborough* held that, in the absence of any agreement, the notice should expire on the 29th of January, 29th of April, 29th of July, or 29th of October. "The defendant," his lordship observed, "might have been made to hold from the preceding or succeeding general quarter-day; but, in the absence of all evidence to the contrary, I must presume that he held from the time when he entered as tenant." (d)

But where a tenant entered in the middle of a quarter, and afterwards paid for that time to the beginning of a succeeding regular quarter, from which time he paid half-yearly, Lord *Ellenborough* held that his tenancy commenced from the quarter succeeding his entering. (e)

However, in another case, where the tenant entered in the middle of a quarter upon an agreement to pay rent "quarterly, and for the half quarter," it was left to the jury to say whether he was tenant from the quarter-day prior to the time when he entered, or from the succeeding quarter-day; and under the direction of Lord *Ellenborough* the jury found that the tenancy commenced from the *preceding* quarter-day. (f)

Where a party took possession on the first of August, and at the Michaelmas following paid the half quarter's rent, and continued afterwards to pay quarterly on the usual feast days: it was held that a notice to quit at *Michaelmas*

(d) *Kemp v. Derrett*, 3 Camp. 510.

(f) *Doe dem. Wadmore v. Sel-*

(e) *Doe dem. Holcomb v. John-*
son, 6 Esp. 10.

wyn, Hil. T. 47 Geo. III. *Adams*,
Eject. 3d edit. 145.

was sufficient; and that although the landlord had at first given notice, expiring with the half quarter, it was not necessarily to be inferred, from that circumstance, that the tenancy from year to year commenced on that day. (g)

Where tenant holds over, the lease being at an end,

If a tenant hold over and pay rent after the expiration of his lease, notice to quit must be given with reference to the time of entry under the lease. (h)

Where a tenant by lease for years continued to hold, after the term had expired, as tenant from year to year; and he becoming a bankrupt, his interest was assigned, and the assignee entered at a time different from that at which the lease commenced, Lord *Ellenborough* held that a notice to quit ought, nevertheless, to expire with reference to the original tenancy, and not to the assignee's entry. (i)

or void.

So where a lease is granted under, but not in conformity with a power, and the remainder-man, instead of ousting the tenant, suffers him to hold on, and thereby creates a new tenancy from year to year, the rule is, that the year must not be taken to begin from the time when such tenancy commences, but must be calculated with reference to the original holding. For instance:—A., tenant for life, having power to make leases for seven years, makes a lease to B. for ten years, to commence from the 1st of January, 1800. On the 1st of February, 1808, A. dies. The lease then becomes void, and the remainder-man has a right to enter and oust B. But if instead of so doing, he suffer him to remain and receive rent of him, and thereby adopt him as his tenant from year to year, (for no acceptance of rent can confirm the original lease which becomes absolutely void on the death of A.,) (k) this new tenancy must have reference to the original lease; and consequently the year must be taken to end with the 31st of December, 1808, and not at

(g) *Doedem. Savage v. Stapleton*, 3 C. & P. 275. *Per Park, J.* muel, 5 Esp. 173.

(i) *Ibid.*

(k) *Doe dem. Castleton v. Samuel*, 5 Esp. 173. (k) *Supra*, p. 350.

beginning on the 1st of February, 1808, and ending with the 31st of January, 1809. And where tenant for life on the 22d of June, 1785, made a lease for twenty-one years, to commence from Old Lady-day, (being the 5th of April,) and died on the 30th of September, 1785, and the tenant continued in possession, *and paid rent to the remainder-man for two years together upon Old Lady-day, and Old Michaelmas day*, the Court held that a notice to quit, expiring on Old Lady-day, was proper. (*l*)

The same rule of law will apply in the case of a tenancy from year to year, by a tenant holding under a lease void by the Statute of Frauds. (*m*)

It frequently happens, especially in farming leases, that premises are let by one demise, but under an agreement that different parts shall be entered upon at different times. The difficulty of giving notice to quit, so as to comprehend all the parts, seems to have been first solved in the case of *Doe* on the demise of *Dagget v. Snowdon*; (*n*) which case, together with others, in which it has been recognized and confirmed, established as a rule, that the notice must be given with reference to the substantial part of the demised premises, which will be sufficient to determine the tenancy as to the auxiliary parts, although six months do not intervene between the date of the notice and the completion of the year for which such auxiliary parts may be held.

Where several parts of the estate demised are leased at several times.

In this case it appeared that a written memorandum was entered into, by which the plaintiff agreed to let the defendant a farm, "To hold the arable ground from the 13th of February then next, the pasture ground from the 5th of April, and the meadow ground from the 12th of May, for seven years from the said days and times, at the yearly rent of

(*l*) Roe dem. Jordan v. Ward, 1 Hen. Bl. 97. Doe dem. Collins v. Weller, 7 T. R. 478, *et vide* Doe dem. Martin v. Watts, *ibid.* 83.

(*m*) Doe dem. Rigge v. Bell, 5 T. R. 471.

(*n*) Bl. Rep. 1224.

26l., clear of taxes, payable half-yearly, at Michaelmas and Lady-day, the first half-yearly payment to be made at Michaelmas next. The defendant to have a privilege of having a way-going crop of three parts of the arable ground after the expiration of the said term, paying at the rate of 13s. an acre for the same, and consuming the same on the premises." The defendant occupied the farm, and continued as tenant after the end of the term. On the 30th of September, the plaintiff gave the defendant a written notice to quit the arable land on the 13th of February next, the pasture on the 5th of April, and the meadow ground on the 12th of May ; which notice bore date the 29th of September.

The question being, whether this notice was sufficient to entitle the plaintiff to recover the whole, or any part of the premises, it was argued by *Davy*, Serjeant, for the defendant, that this was not a sufficient notice for any part, the whole being one entire tenancy ; and therefore notice to quit ought to have been given on the 13th of August, being six months previous to the time when the first part of the term expired. But *Gould*, *Blackstone*, and *Nares*, Justices, (*absente de Grey*, C. J.) held that the notice was sufficient for the whole. " It was settled," they said, " by all the judges about ten years before, that in tenancies from year to year (which these kinds of holdings over are held to be) there must be on either side six months' notice to quit according to the ancient law ; except where any special agreement or the custom of particular places intervene. The true construction of this agreement is, that it is a holding from Lady-day to Lady-day old style ; the rent being payable at old Michaelmas and Lady-day. And though part of the farm is to be entered upon and quitted at Old Candlemas, February 13, and other part not till old May-day, May 12, yet that is no more than the custom of most countries would have directed without any special words for that purpose in a taking from old Lady-day, the 5th of April, *vis.*, that the arable shall be entered upon at Candlemas, to prepare it for the Lent corn ; and the meadows not till May-day, when it

those northern countries they are usually heynd for hay. And if any inconvenience could have happened to the retiring tenant by this mode of quitting, it is sufficiently obviated in the present case by the clause which provides a way-going crop for the tenant. Whereas great mischief might happen to the landlord by requiring a notice to be given so early as the 13th of August, by giving room to the tenant to harass and wear out the land out of the usual course of husbandry; and particularly by taking a second crop of hay from the meadows."

This case of *Doe v. Snowden* has been fully established by other decisions.

Thus, under an agreement by a tenant of a farm to enter on the tillage land at Candlemas, and on the house and all other the premises at Lady-day following, and that when he left the farm he should quit the same *according to the times of entry as aforesaid*, the rent being reserved half-yearly, at Michaelmas and Lady-day; it was held that a notice to quit delivered half a year before Lady-day, but less than half a year before Candlemas, was good; the taking being in substance from Lady-day, with a privilege for the incoming tenant to enter on the arable land at Candlemas, for the sake of preparing it; and a stipulation by him when he quitted the farm, to allow the same privilege to the incoming tenant. And the Court thought that the particular terms of this agreement, *viz.*, to quit "according to the times of entry as aforesaid," did not raise a distinction between the case and *Doe v. Snowden*. (*p*)

A subsequent case has extended the rule to other than mere farming leases. Under an agreement of demise, dated in January, of a dwelling-house and other buildings for the purpose of carrying on a manufacture, together with certain meadow, pasture, and bleaching grounds, water-courses, &c.,

(*p*) Doe dem. *Strickland v. Spence*, 6 East, 120.

for a term of thirty-five years, *to commence, as to the meadow ground, from the 25th of December last, as to the pasture, from the 25th of March next, and as to the housing, mills, and all the rest of the premises, from the 1st of May; reserving^q the first half-year's rent on the day of Pentecost, and the other half-year's rent at Martinmas*; it was held that the substantial subject of demise being the house and buildings for the purpose of the manufacture, which were to be entered on the 1st of May, that was the substantial time of entry to which a notice to quit ought to refer; and not the 25th of December, when the incoming tenant had liberty of entering on the meadow, which was merely auxiliary to the other and principal subject of demise; and consequently that a notice served on the 28th of September, (which would have been sufficient with reference even to the 25th of March,) to quit *at the expiration of the current year of the holding*, was sufficient. (*q*)

What is the principal, and what the accessory part of the demise, is a question of fact for the jury, upon which the judge is to decide whether the notice was served in time. Where a house and land were let together, and the judge taking upon himself to decide that the land was the principal subject of demise, nonsuited the plaintiff in ejectment on the ground of an insufficient notice; the Court, on an application to set aside the nonsuit, agreed that the question of preponderance was a question for the jury: but as the plaintiff acquiesced in the opinion of the judge, and did not desire him to leave it to the jury, they refused to set aside the nonsuit. (*r*)

The difficulty of ascertaining the commencement cured by waiver.

The notice to quit is of itself *no* evidence of the time at which the tenancy commenced. (*s*) Yet if a specific time for quitting is mentioned in the notice, and it is personally

(*q*) Doe dem. Lord Bradford v. Watkins, 7 East, 551.

(*r*) Doe dem. Heapy v. Howard, 11 East, 498.

(*s*) In Doe dem. Ash v. Calvert,

2 Campb. 387. It was so held by Eyre, B. in Doe dem. Puddicombe v. Harris, *Dorchester Summer Assizes*, 1784, cited 1 T. R. 161.

served upon the tenant, and he receives it and makes no objection to it, this is evidence from which the jury may conclude that the tenancy began at the time at which the notice is to expire. (t)

A notice was given on the 22nd of March, by a landlord to his tenant, to quit at the expiration of the current year. A declaration in ejectment, laying the demise on the 1st of November, was on the 16th of January following served on the tenant, who at the time made no objection to the notice to quit, but said he should go out as soon as he could fit himself: this was held to be *prima facie* evidence that the tenancy commenced at Michaelmas, and was determined before the day of the demise laid in the declaration; this appears to have been a strong case in favor of the landlord. (u)

The custom of the country may sometimes prove the commencement of the tenancy, as where notice was delivered on September 27th, to quit "at the expiration of the term for which you hold the same," which notice was served personally upon the tenant, who observed, "I hope Mr. M. does not mean to turn me out:" *Holroyd, J.*, permitted the lessor to prove that it was the *general custom* in that part of the country where the demised lands lay to let the same from Lady-day to Lady-day, and that the defendant's rent was due at Michaelmas and Lady-day respectively; and directed the jury to presume, that this tenancy, like other tenancies in that part of the country, was a tenancy from Lady-day to Lady-day. (v)

Custom of the country.

But in order to make evidence of this nature available, it must be shewn that the notice was personally served upon the party so as to give him an opportunity objecting to it. (w)

(t) Doe dem. Leicester v. —, 2 Taunt. 109. Doe dem. Clarges v. Forster, 13 East, 405. Thomas dem. Jones v. Thomas, 2 Campb. 647.

well, 2 Campb. 559.

(v) Doe dem. Milnes v. Lamb, Nottingham Summer Assizes, 1817: cited Adams on Ejectment, 316, 3rd edit.

(u) Doe dem. Baker v. Woomb-

(w) Doe v. Forster, *sup.*

Assent by
tenant.

If the tenant assents to the notice, he will not be allowed to shew it expires at a wrong time, but such assent must be clear, and not amount merely to a want of objection. For where a tenant in possession, when served with a notice to quit at *Midsummer*, said, "I pay rent enough already, and it is hard to use me thus," he was permitted to shew that he held from *Michaelmas*; and *Buller, J.*, said, that whether the tenant had assented to be considered as holding from *Midsummer* would have been a question of fact for the jury. (x)

If tenant
misleads.

If the tenant misleads his landlord, he will be bound, as where a tenant, on being applied to respecting the commencement of his holding, informed the lessor that it began on Lady-day, and six months' notice was accordingly given to quit at Lady-day, Lord Kenyon would not allow the tenant to shew that the tenancy began at a different time; saying, "that it made no difference whether the information so given proceeded from mistake or design, as it had equally the mischief of leading the landlord into an error." (y)

Receipt.

A receipt for rent up to a particular day, stating it to be a year's rent, is *prima facie* evidence of the commencement of the tenancy on that day. (z)

Acquiescence.

The acquiescence of the party served with a notice short of six months will be *prima facie* evidence that some agreement existed between the parties that a notice of less than the regular length should be given. For when three months' notice only was given by the tenant, and the lessor neither expressed his assent or dissent, and took the rent up to the time when the tenant quitted, Lord Kenyon said, "that the parties might by agreement dispense with the six months' notice; and the acquiescence of the parties was presumptive evidence of such agreement, as the lessor had received the

(x) *Oakapple dem. Green v. Co-* 2 Esp. 635.
pous, 4 T. R. 361.

(z) *Doe dem.*] *Castleton v. Sa-*
muel, 5 Esp. 173.

(y) *Doe dem. Eyre v. Lambly*,

notice to quit at the end of three months, and never expressed to the tenant any dissent whatever; which he thought he should have done, if he had meant to have refused his assent to the tenant's quitting according to the notice. (a)

3. Notice to quit by the agent of an agent is not sufficient without a recognition by the principal, (b) nor by a mere agent to receive rents, but an agent *to let* and receive rents has, it seems, such an authority. (c)

By whom the notice must be given.
Agent.

The agent should have his authority at the time the notice begins to operate, and a subsequent recognition will not, it seems, be sufficient; (d) and at all events the bringing of the ejectment is not a sufficient recognition. (e)

At what time agent should have authority.

Where a lease for twenty-one years contained a proviso, that in case either landlord or tenant, or their respective *heirs and executors*, wished to determine it at the end of the first fourteen years, and should give six months' notice in writing *under his or their respective hands*, the term should cease; it was held that a notice to quit, signed by two only of the three executors of the original lessor, to whom the freehold was devised as joint tenants, expressing the notice to be given on behalf of themselves and the third executor, was bad, notwithstanding a subsequent recognition of it by the third executor, (f) but this decision was on the ground that a specific mode of determining the tenancy was pointed out by the lease.

It is said, in a printed case, (g) that a subsequent recognition

Subsequent recognition, if good.

(a) *Shirley v. Newman*, 1 Esp. 266.

Rhodes v. Robinson, *supra*.

(b) *Doe dem. Rhodes v. Robinson*, 3 Bing. 677. N. S.

(c) *Ibid*.

(c) *Doe dem. Manaus v. Mizem*, 2 Moo. & Rob. 56.

(f) *Right dem. Fisher v. Cuthell*, 5 East, 491. 5 Esp. 149, *et vide* 1 B. & Ad. 142.

(d) *Doe dem. Mann v. Walters*, 10 B. & C. 621. *Adams on Eject.* 3rd edit. p. 626, *et vide Doe dem.*

(g) *Doe dem. Mann v. Walters*, 10 B. & C. 626, *et vide Doe dem. Rhodes v. Robinson*, *supra*.

may be sufficient, as where such notice was given by an agent under a written authority, which *authority*, at the time of the service of the notice, had been signed only by some of several joint-tenants, but afterwards was signed by all the others:—it was held, that the subsequent recognition was sufficient to give validity to the authority from the beginning, and that the notice to quit was therefore sufficient. (*f*) But, according to the note in *Adams on Ejectment*, the true ground of this decision was, that the notice was given by some of several joint-tenants, which, according to *Doe v. Summersett*, (*g*) was binding on all.

In a case in which A. demised premises to B. for one year certain, and it was agreed that, after the expiration of that year the tenancy should expire, on three months' notice being given by A.; and B., having entered, took receipts for the rent from A., first in his own name only, and afterwards in the names of himself and two others, who were his partners, and after three years' possession, he received a notice to quit from A. alone: it was held, that A. might recover on his own demise in an action of ejectment; the notice to quit from A. alone being sufficient to determine the tenancy. (*h*)

By joint
tenants.

If joint tenants concur in a lease from year to year, a notice by one on behalf of himself and the others is sufficient to determine the tenancy as to all.

Upon a joint demise by joint tenants from year to year, the true character of the tenancy is this, that the tenant holds of each, the share of each so long as he and each shall please. But he holds the whole of all, so long as he and all shall please, and as soon as any one of the joint-tenants gives a

(*f*) Goodtitle dem. *King v. Woodward*, 3 B. & A. 689, *et vide* *Doe dem. Jolliffe v. Sybourn*, 2 Esp. 677.

(*g*) 1 B. & Ad. 135.

(*h*) *Doe dem. Green and others v. Baker*, 8 Taunt. 241.

notice to quit, he effectually puts an end to that tenancy ; also the tenant has a right, upon such notice, to give up the whole, and unless he comes to a new arrangement with the other joint-tenants, as to their shares, he is compellable so to do. The hardship upon the tenant, if he were not entitled to treat a notice from one, as putting an end to the tenancy as to the whole, is obvious, for, however willing a man might be, to be sole tenant of an estate, it is not very likely he should be willing to hold undivided shares of it. And if upon such a notice, the tenant is entitled to treat it as putting an end to the tenancy as to the whole, the other joint-tenants must have the same right. (*h*)

In the case of joint-tenants seised in their own right, as they may demise their shares severally, so if they demise jointly from year to year, and one of them give notice to quit, and brings his action by a separate demise, the notice will be good in respect of his share, and he may thereupon recover it in ejectment. (*i*) But, as before observed, all parties have a right to consider the notice as determining the tenancy as to the whole.

As to parceners and tenants in common, a notice by one on behalf of all can only be valid so far as his share is concerned, unless he is an authorized agent for the others. (*k*)

Parceners and
tenants in
common.

A receiver appointed by the Court of Chancery, with a general authority to let the lands from year to year, has also authority to determine such tenancies by regular notice to quit. (*l*)

Receiver in
Chancery.

(*h*) Doe dem. Aslin *v.* Summersett, 1 B. & C. 135, *et vide* Doe dem. Elliott *v.* Hulme, 2 Man. & Ryl. 433.

(*i*) Doe dem. Whayman *v.* Chaplin, 3 Taunt. 120, *et vide* Doe *v.* Summersett, *supra*.

(*k*) Doe dem. Whayman *v.* Chaplin, *supra*. Doe dem. Green *v.* Baker, 8 Taunt. 241.

(*l*) Doe dem. Marsack *v.* Read, 13 East, 57. Wilkinson *v.* Colley, Burr. 2694, 2698.

Steward.

It has been ruled at *Nisi Prius* that a verbal notice by the steward of a dean and chapter is sufficient to maintain an ejectment, without proof of his having authority under seal from the corporation for that purpose. (*l*)

4. To whom
the notice must
be given.

4. The notice must be given to the immediate tenant, although the whole or part is underlet. A lessor cannot give notice to a sub-lessee, or *vice versâ*; there being no privity of contract between them. (*m*) And it was ruled by Lord *Ellenborough*, that service on a relation of an under-tenant, though served on the premises, and addressed to the original tenant, was insufficient. (*n*) But the lessor's notice to his own lessee will enable him to recover the premises in the possession of the sub-lessees. (*o*) And where the original tenant has quitted, and another has taken possession, it will be presumed, in the absence of any evidence to the contrary, that the latter has come in as the assignee of the former, though he has never paid rent, and notice will be well served upon such assignee. (*p*)

Where a corporation is tenant, notice to quit must be given *to the corporation* and served upon its officers. A notice addressed to the officers will not be sufficient. (*q*)

6. Form of
notice.

5. Although it is advisable that a notice to quit should be in writing, yet it may in all cases be by parol, unless a written notice be made necessary by agreement between the parties; (*r*) or where a power requires a party to determine a

(*l*) *Roe dem. Dean and Chapter of Rochester v. Pierce*, 2 Camp. 96.

(*m*) *Pleasant, Lessee of Hayton v. Benson*, 14 East, 234.

(*n*) *Doe dem. Mitchell v. Levi*, MSS. Adams on Eject. 3rd edit. p. 130.

(*o*) *Roe v. Wiggs*, 2 N. R. 330.

(*p*) *Doe dem. Morris v. Williams*, 6 B. & C. 41, and see *Doe dem.*

Batten v. Murless, 6 M. & S. 110.

(*q*) *Doe dem. Earl of Carlisle v. Woodman*, 8 East, 228.

(*r*) *Timmins v. Rowlinson*, Burr. 1603. S. C. Bl. Rep. 533. *Doe dem. Lord Marcartney v. Crick*, 5 Esp. 196. *Roe dem. Dean and Chapter of Rochester v. Pierce*, 2 Campb. 96.

tenancy by notice in writing. (r) But as a tenancy from year to year cannot be determined unless there is a legal notice to quit, or a surrender in writing or in law; therefore, a mere parol license from the landlord to the tenant to quit in the middle of the quarter, and the tenant's quitting the premises accordingly, will not determine the tenancy; for this would amount to a surrender, which, under the Statute of Frauds, must be in writing. (s)

A notice to quit to a tenant of lands originally devised to the rector and churchwardens of a parish, and their successors in trust, signed by the rector and churchwardens, requiring the tenant to deliver up the premises to *the rector and churchwardens for the time being* is ill, for there are no such persons as rector and churchwardens known to the law as a continuing body, or body corporate, and so the defendant could not know to whom he was to deliver possession. (t)

The notice must be explicit and positive; therefore, it must not give the tenant an option of leaving the premises or entering into a new contract. (u) A notice to quit, "or I shall insist on double rent;" was held good; because the latter part evidently only referred to the penalty inflicted by the statute 4 Geo. II. c. 28, though it had mistaken the terms of that statute, which gives double *the annual value* and not *double rent*. (v)

If, however, the notice had really contained the option of a new agreement, and had said, for instance, "or else that you agree to pay double rent," it would have been bad. (w)

(r) Legg dem. Scot v. Benion, Willes, 43. And see Right dem. Fisher v. Cuthell, 5 East, 491.

(s) Mollett v. Brayne, 2 Campb. 103. S. P. Thompson v. Wilson, 2 Stark. 378, *et vide* 2 Man. & Ryl. 439, note

(t) Doe dem. Brooks v. Fairclough, 6 M. & S. 40.

(u) Doe dem. Matthews v. Jackson, Doug. 175.

(v) *Ibid.*

(w) *Ibid.* per Lord Mansfield.

Where different things are let under a joint demise, the tenancy cannot be put an end to by notice as to part: the notice will be a nullity, unless it extend to the whole. But the Courts will presume against an intention to determine the tenancy in part, and will, if possible, give effect to the notice so as to determine the tenancy altogether. And, therefore, where a house and lands, together with certain *great and small tithes*, were let from year to year at a joint rent, and a notice was given to quit "all that messuage, tenement, or dwelling house, farm, lands, and premises which you rent of me," Le Blanc, J., said, that the landlord could not determine the tenancy as to the land, without at the same time determining it as to the tithes; and his lordship ruled that the notice was sufficient for that purpose. (x)

So where a lease for twenty-one years was made of a farm, one part of which was known by the name of *Town-Barton*, and another part by the name of *Shippen-Barton*; with power to either party to determine the lease at the end of fourteen years, on giving two years' previous notice; and a notice was given by the landlord to the tenant to quit "*Town-Barton, &c.*, agreeable to the terms of the covenant;" the Court of King's Bench held the notice sufficient to include *Shippen-Barton*. (y)

Mistake.

In case of an obvious mistake, the Courts will give effect to the intention of the parties. As where a notice was delivered to a tenant at *Michaelmas*, 1795, to quit at Lady-day, *which will be* in the year 1795, the Court held the notice good; for the words "which will be" plainly shewed that it meant next Lady-day. (z)

So a notice dated the 27th, and served on the 28th of

(x) Doe dem. Morgan v. Church, 14 East, 245.
3 Campb. 71.

(z) Doe dem. Duke of Bedford

(y) Doe dem. Rodd v. Archer, v. Kightley, 7 T. R. 63.

September, requiring a tenant to quit at Lady-day next, or at the end of his current year, which was at Michaelmas, must be understood to mean, not a two-day's notice for the then next Michaelmas, but such a notice as the law requires, applicable to the current year to which the Lady-day belonged. (a)

Nor will a misdescription of the premises be fatal; if they be so designated as to make it impossible that the person receiving the notice should have been misled by it. As where the plaintiff gave a notice to quit "the premises which you hold of me, situated in the parish of *Limehouse, St. Anne*, called the *Waterman's arms*," when, in fact, the only premises which the tenant held of the plaintiff were called the *Bricklayer's arms*; in this case, upon its being shewn that there was no sign of the *Waterman's arms* in the parish of *St. Anne*, and that the tenant held no other premises of the plaintiff, Lord *Ellenborough*, C. J., held the notice sufficiently certain. (b)

The alteration made in the style has in some cases created misunderstanding. It must now be understood, that a letting from any particular feast means, that feast according to the new style. If the letting is *by deed*, no extrinsic evidence can be admitted to shew that the parties meant the old style, therefore, in a modern case, it was held, that a lease *by deed* to hold from the feast of *St. Michael*, must be taken to mean from *new Michaelmas*; and that no extrinsic evidence could be admitted to shew that the holding referred to *old Michaelmas*; and consequently it was decided that, under such a letting, a notice to quit at *old Michaelmas*, though given half a year before *new Michaelmas*, was bad; for as the notice must be given to quit at the end of the year, if it might be given to quit at twelve days afterwards, it might as well be at any other period. (c)

(a) Doe dem. Lord Hunting- Esp. 185.

ower v. Culliford, 4 D. & R. 248.

(c) Doe dem. Spicer v. Lea, 11

(b) Doe dem. Cox v. ———, 4 East, 312.

But if the letting is not by deed, such evidence is admissible, and, therefore, where the tenant, under written agreement, not under seal, from "Lady-day;" a notice to quit "on the 6th April," was adjudged to be good; it being proved by parol evidence that the parties meant old Lady-day. (*d*)

Supposing the tenancy to have commenced *at old Michaelmas*, a notice to quit "*at Michaelmas*" generally, is good, and may be referred either to the old or new style. (*e*) And when it was uncertain whether the year expired at *new* or *old Michaelmas*, a notice to quit on the 25th day of March, or the 8th of April, served six calendar months before the tenancy could have begun, was held sufficient. (*f*)

In all cases where the time of the expiration of the tenancy is doubtful, it seems most eligible to give notice "to quit at the expiration of the current year of the tenancy which shall expire one half-year from the service of the notice;" it not being necessary to specify the particular day on which the tenancy is supposed to end. (*g*)

Surplusage.

It has been already shewn that a misdescription will not be fatal, if the identity is sufficiently preserved, and in order to give effect to the notice, the Court may also reject words as surplusage, as in a case of a tenancy from year to year, where the year of the holding expired on the 2nd of February, and the notice was given on the 22nd of October, to deliver up possession at the expiration of half a year from the delivery of the notice, or such other time as your *present* year's holding shall expire after the expiration of half a year

(*d*) Denn dem. Peters *v.* Hopkinson. And see Doe dem. Hall *v.* Benson, 4 B. & A. 588.

(*e*) Doe dem. Hinde *v.* Vince, 2 Campb. 256. Doe dem. ——— *v.* Brookes, *ibid.* note. Denn dem. Willan *v.* Walker, Peake Add. Cas. 194. Furby dem. Mayor of Can-

terbury *v.* Wood, 1 Esp. 198. Smith *v.* Walton, 8 Bingh. 235. 1 Moore & Sc. 380.

(*f*) Doe dem. Mathewson *v.* Wrightman, 4 Esp. 5.

(*g*) Doe dem. Phillips *v.* Butler, 2 Esp. 589.

from the delivery of the notice. The Court rejected the word "present," and held the notice good to quit on the 2d of February, in the following year. (i)

Where the notice is in writing, it is not necessary that it should be directed to the tenant in possession, provided it be personally served upon him. (k) And if the notice be directed to the tenant by a wrong Christian name, and the tenant keep it, that amounts to a waiver of the misdirection. (l)

Direction of notice.

6. Although always desirable, yet it is not actually necessary that the notice be personally served upon the tenant: for it may be left at his house, whether upon the demised premises, or elsewhere, with his wife or servant, from which it will be presumed that it reached the tenant, on its nature and contents being explained at the time. (m) In order, however, to raise this presumption, in the absence of proof that it reached the tenant, it must be shewn to have been delivered into the hands of his wife or servant, and not merely that it was left at his house. (n)

6. Service of notice.

But if it be delivered to the wife or servant, the service will be good, although the tenant be not informed of it until within half a year of its expiration. (o)

It has been decided, that where tenant at will underlet at will, a demand of possession from the wife of the underlessee, made on the premises, is sufficient to determine the tenancy. (q)

Where two or more tenants occupy under a joint demise,

(i) Doe dem. Williams and another v. Smith, 5 Ad. & Ell. 350.

(k) Doe dem. Mathewson v. Wrightman, 4 Esp. 5.

(l) Doe dem. ——— v. Spiller, 6 Esp. 70.

(m) Jones dem. Griffith v. Marsh, 4 T. R. 464, *et vide* Doe dem. Lord Bradford v. Watkins, 7 East, 550.

Doe dem. Neville v. Dunbar, 1 Moo. & M. 42, note.

(n) Doe dem. Buross v. Lucas, 5 Esp. 153.

(o) Doe dem. Neville v. Dunbar, 1 Moo. & Malk. 10. Lord Tenterden.

(q) Doe dem. Blair v. Street, 4 Nev. & M. 42.

service of a written notice to quit upon one of them is sufficient. (r) And, in a similar case, where one tenant lived upon the premises, and the other lived elsewhere, service upon the one on the premises was held to be *prima facie* evidence that the notice reached the other. (s)

The notice to quit, if in writing, had better not be attested, but if it be attested by a subscribing witness, that witness must be produced, or his absence must be accounted for:—proof that it was served on the tenant, and that he read it, and made no objection to it, not being in such case sufficient, for the objection to it as a parol notice is, that it is in writing; and the objection to it as a written notice is, that the handwriting of the party is not proved by the attesting witness. (t)

7. What will amount to a waiver of notice.

7. Although the landlord has given notice, and the time has expired, yet he may do some act which will amount to a waiver of the notice.

Receipt of rent.

If he receive *rent* accruing after the expiration of the notice, this amounts to a recognition of a subsisting tenancy, and operates as a waiver of the notice. It is a question for the jury whether the money was paid *as rent*; but if they find in the affirmative, then the Court will consider the notice as waived, and the tenancy re-established. (u)

But the landlord must have notice of the fact of payment, or otherwise it will not amount to a waiver, as where the tenant had been in the habit of paying his rent to the landlord's banker, and a notice having been served upon him, he, after its expiration, paid another quarter's rent into the banker's, who knew nothing of the notice; Lord *Ellenborough*, C. J., held, *in the absence of any proof that the*

(r) Doe dem. Lord Macartney 2 M. & S. 62.
v. Crick, 5 Esp. 196.

(s) Doe dem. Lord Bradford v. Watkins, 7 East, 551.

(t) Doe dem. Sykes v. Durnford,

(u) Goodright dem. Charter v. Cordwent, 6 T. R. 219, *et vide*. Doe dem. Cheny v. Batten, Cowp. 243. And the cases there cited.

rent so paid had come to the lessor's hands, that the notice was not thereby waived. (v)

A *distress* taken for rent, accruing due after the expiration of the notice, is a waiver of the notice. (*w*) Distress.

But after a verdict in ejectment there can be no waiver of the notice to quit; and therefore the Court of Common Pleas refused to set aside a verdict obtained by a landlord, on the ground that he had made a distress for rent accrued due subsequent to the verdict. (*x*)

So a notice to quit is waived by a subsequent notice; because the latter acknowledges the tenancy to be subsisting after the expiration of the former. (*y*) Subsequent notice.

To this rule there are several exceptions, as where after the expiration of a notice to quit, the lessor gave his tenant a fresh notice, "that unless he quit in fourteen days he will be required to pay double value," it was held the second notice was no waiver of the first; because it contemplated the tenant rather as a trespasser than a tenant, and was only a qualified condonation of the trespass. (*z*)

And if it is manifest that the second notice is not intended as a waiver of the first, it seems it will not operate as such. Thus, where a landlord gave a notice to quit different parts of a farm at different times, which the tenant neglected to do. The landlord thereupon commenced an ejectment against him; and before the last period mentioned in the notice was expired, the landlord, fearing that the witness by whom he was to prove the notice would die, gave another

(*v*) Doe dem. *Ash v. Calvert*, 2 Campb. 387.

(*w*) Zouch dem. *Ward v. Willingale*, 1 H. Bl. 311.

(*x*) Doe dem. *Holmes v. Darby*, 8 Taunt. 538. The Court added that if the distress created a new

tenure, the defendant might bring his ejectment.

(*y*) Doe dem. *Brierly v. Palmer*, 16 East, 53.

(*z*) Doe dem. *Digby v. Steel*, 3 Campb. 117. *S. P. Messenger v. Armstrong*, 1 T. R. 52.

notice to quit at the respective times in the following year, but continued to proceed with his ejectment. It was contended that this amounted to a waiver of the first notice. But the Court held it to be no waiver; because it was impossible for the defendant to suppose that the landlord meant to waive the first notice, when he knew that the landlord was, on the very foundation of that notice, proceeding by ejectment to turn him out. (a)

The second notice is only a waiver by implication, and it is always competent to the party giving the notice to express his intention that it shall not operate as a waiver of a previous notice. (b)

If no notice
necessary.

Assuming no notice to quit to be actually necessary, and yet a notice to be given "to quit the premises which you hold under me, your term therein having long since expired," the Court will consider it a mere demand of possession, and not a recognition of a subsisting tenancy. (c)

In a case where a landlord of premises, being about to sell them, gave his tenant notice to quit on the 11th of October, 1806; but promised him not to turn him out unless they were sold; and the premises not being sold till February, 1807, the tenant refused on demand to deliver up possession: on ejectment brought, the Court of King's Bench held, that the promise (which was performed) was no waiver of the notice nor did it operate as a license to remain on the premises, otherwise than subject to the landlord's right of acting on such notice if necessary; and therefore, that the tenant not having delivered up possession on demand after a sale, was a trespasser from the expiration of the notice to quit. (d)

V. By for-
feiture.

V. By Forfeiture.

(a) Doe dem. Williams v. Humphreys, 2 East, 237.

(b) *Ibid.* 248.

(c) Doe dem. Godsell v. Inglis,

3 Taunt. 54.

(d) Whiteacre dem. Boulton v. Symonds, 10 East, 13.

The relation of landlord and tenant may be dissolved by the tenant incurring a forfeiture by breach of some condition, either implied or expressed, and the reversioner's entry thereupon. For if the tenant take upon himself to do an act which is inconsistent with his character as tenant; (*e*) as, if, being tenant for years, he make a feoffment; or give up the possession to a party claiming an adverse title to the lessor; (*f*) or if he be guilty of a breach of any express condition inserted in his lease; a forfeiture will be thereby incurred, and the lord may enter upon him. (*g*)

By a *forfeiture* of the original lease, all the under-leases will be defeated, as much as by effluxion of time, although no voluntary act of the lessee would have that effect.

A memorandum made by a tenant after the commencement of an action of ejectment, of attornment by him to a third party, will be sufficient evidence of a disclaimer to rebut his title as tenant. (*h*) But to constitute a disclaimer, the act must be inconsistent with a continuance of the tenancy. (*i*)

If the tenant disclaim the landlord's title, and subsequently the landlord distrains for rent, such distress will be a waiver of the forfeiture. (*k*)

It has been seen that, at common law, only the lessor, his heir or executor, could enter for a breach of the condition: (*l*) or if a limitation were affixed to the estate, then he in remainder might enter, because the estate determined *ipso facto* without entry. (*m*) But by the statute 32 Hen. VIII.

Who may enter for a forfeiture.

Heir, &c.

(*e*) Bac. Ab. *Leases*, (T. 2.) Hoveden v. Annesley, 2 Sch. & Lef. 625. Buller's N. P. 96.

(*f*) Doe dem. Ellerbrooke v. Flynn, 1 C., M. & R. 137. 4 Tyr. 619.

(*g*) Read v. Erington, Cro. Eliz. 321. Fenn dem. Matthews v. Smart, 12 East, 444. Goodright dem. Walter v. Davids, Cowp. 803.

(*h*) Doe dem. Mee. & others v. Litherland, 6 Nev. & M. 313. 4 Ad. & Ell. 784.

(*i*) Doe dem. Gray v. Stanion, 1 Mees. & W. 695. 1 Tyr. & Gr. 1065.

(*k*) Doe dem. David v. Williams, 7 C. & P. 322.

(*l*) *Supra*, Lit. s. 347.

(*m*) *Ibid*.

Grantee of
reversion.

c. 34, the assignee of the reversion, his heir, executors, and assigns, shall have the like advantage against the lessee, &c., by entry, as the lessor himself; and, therefore, every grantee of a reversion by the king or a common person may by this statute take advantage of a condition broken. (m) So an assignee of *part of the reversion* may take advantage of a condition. (n) But not the assignee of the reversion of *part of the land*; because a condition cannot in general be apportioned; and, therefore, if the lessor assign the reversion of part of the land, the condition is gone *in toto*. (o) A condition, however, may be apportioned in two cases: 1. by act of law; as where a man is seised of two acres, one in fee and the other in borough English, and having issue two sons, makes a lease of both acres, rendering rent, with a condition and dies; in this case the reversion, rent, and condition are divided and apportioned by act of law. (p) 2. A condition may be apportioned by the act and wrong of the lessee; as if he make a feoffment of part, or commit waste in part, and the lessor enter for the forfeiture, or recover the place wasted, the rent and condition shall be apportioned. (q)

In order to give the grantee the benefit of the condition, he must be in of the same estate as that of the original reversioner; and therefore, if the legal estate is outstanding at the creation of the lease, and is afterwards got in by the lessor, and a conveyance made by him of the estate, subject to the lease, the grantee will not have the benefit of the covenants and conditions, as he will not be in of the same estate. (r)

Of what con-
ditions ad-
vantage can be
taken.

An assignee of a reversion shall not take advantage of a breach *of every condition* of re-entry; but only of the con-

(m) Co. Lit. 215. a. And see this statute cited *supra*.

(n) *Ibid*.

(o) Co. Lit. 115. a. Dumpor's case, 4 Rep. 119. Appowal v. Monnoux, Moore, 97. Knight's case, 5 Rep. 56. Sir Richard Lee v.

Arnold, 4 Leon. 27. But the king is an exception to this rule, Knight's case, *supra*.

(p) Dumpor's case, 4 Rep. 119.

(q) *Ibid*.

(r) Whitton v. Peacock, *supra*.

ditions mentioned in the statute, *viz.*, for non-payment of rent, for waste, or other matter of the same nature; for though the statute speaks of *other forfeiture*, yet this is to be understood only of other forfeiture *of the same nature*, and like to those examples which are there put; that is to say, all conditions to do any thing incident to the reversion, as payment of rent; or conditions for the benefit of the estate, as not committing waste; but not conditions to do, or not to do, *collateral acts*. (s)

It has been doubted whether the assignee of the reversion can take advantage of a condition of re-entry, if the lessee shall *assign without license*. (t) A covenant not to assign does not run with the land, as against the assignee of the lessee. (u) Whence it seems to follow that a condition of *re-entry*, if the lessee assign without license, is not within the statute; and that the assignee of the reversion cannot maintain an ejectment for a breach of such a condition, any more than he could do at the common law. (v)

Against assign-
ment without
license.

If a party, having granted a lease, afterwards assign over all his estate, &c., to a third party, by way of mortgage, the tenant may set up the title of the mortgagee as a defence to an action of ejectment by his lessor. (w)

In order to give a party a right to re-enter for a condition broken, it is not requisite that he should have any actual reversion after the grant. Therefore, if A., being lessee for years, assign his whole term to B., upon condition, A. may enter upon B. for breach of the condition, though he have parted with his whole term; (x) just as a tenant in fee who has made a feoffment upon condition may enter upon the feoffee for breach of the condition. (y) But a third person

(s) Co. Lit. 215. b.

(t) Lucas v. How, Sir T. Raym. 250.

(u) *Supra*.

(v) 1 Saund. 287. d. n. (16.)

(w) Doe dem. Marriott v. Edwards, 3 Nev. & M. 193.

(x) Doe dem. Freeman v. Bateman, 2 B. & A. 168.

(y) Lit. s. 325.

cannot enter for a breach of a condition unless he come in under the lessor: and, therefore, if lessee for twenty years make a lease for ten upon condition, and then surrender to him in reversion, the reversioner being in of a paramount estate cannot take advantage of the condition. (x)

The grantee of the reversion cannot take advantage of a forfeiture, committed prior to the date of the grant, as where a forfeiture had been incurred by tenant for years in levying a fine, and the reversioner had neglected to enter, the Court of King's Bench held that, after the reversion had been granted over, neither the grantor or the grantee of the reversion could take advantage of such forfeiture. (a)

When entry
necessary.

In the case of a lease *for life*, whatever may be the words of the condition determining the estate, the lessor must nevertheless enter; because an estate which commenced in livery cannot be determined without entry. (b)

Void and
voidable.

But as to leases for years, a great distinction has prevailed between conditions making the term void or voidable on a given event, it being considered that in the former case no entry or claim by the landlord was necessary for determining it on breach of the condition, and that no subsequent recognition of the tenancy could set up the term against the forfeiture. (c) It is clear that the doctrine, if carried out to its full extent, might enable the tenant, by his own act, to get rid of any disadvantageous lease or contract.

In a case which occurred at law, (d) it appeared that a lease of mines had been granted, by which a royalty rent was reserved, and in which was a proviso that the lease should be *void to all intents and purposes* if the tenant ceased working at any

(x) *Chaworth v. Phillips*, Moore, 135.
876, *et vide* *Webb v. Russell*, T. R.

(a) *Fenn dem. Matthews v. Smart*, 12 East, 444, *et vide supra*, p. 321.

(b) *Browning v. Beston*, Plowd.

(c) Co Lit. 215, a. *Finch v. Throgmorton*, Cro. Eliz. 220. *Mulcary v. Eyres*, Cro. Car. 511.

(d) *Doe dem. Bryan v. Banks*, 3 B. & A. 401.

time for two years. The tenant made a breach of the condition, and the landlord subsequently received rent. The Court of King's Bench held that the lease did not become void by the cessor of the two years' working, unless the landlord thought fit to make it so, or, in other words, that it was *voidable* only at the option of the *lessor*.

In a subsequent case (*e*) in Equity, the proviso was, that if the rent should be in arrear and there should be no sufficient distress for the same, or if the tenant should become insolvent, or fail in the performance of any of the covenants, the demise should wholly cease and *be void*, and the lessor might at any time after re-enter. The Master of the Rolls held the lease to be *voidable* only and not void.

In another case (*f*) in the King's Bench, the proviso was similar in effect to that in *Dakin v. Cope*, and the Court held the lease to be *voidable*, and the forfeiture to be waived by a subsequent receipt of rent. (*g*)

These decisions were in accordance with a prior case in the King's Bench, heard in 1817, in which the proviso in a lease was, that it should be void in case the rent should be unpaid for forty days, and the Court held, that the breach of the condition did not make the lease voidable at the option of the *lessee*, who could not take advantage of his own wrong.

In a yet later case, (*h*) heard also in the King's Bench, the same doctrine prevailed, and it was held, that a proviso making a license void, on non-working of mines for six months, or breach of any of the covenants, was to be construed as making the lease voidable only at the option of the *grantor*.

In this latter case, it was asserted by counsel that the dis-

(*e*) *Dakin v. Cope*, 2 Russ. 170.

(*g*) *Rede v. Farr*, 6 M. & S. 121.

(*f*) *Arnby v. Woodward*, 6 B. & C. 519.

(*h*) *Roberts v. Davey*, 1 Nev. & M. 443.

inction between freehold and term of years, as to a necessity of an entry to determine the interest, no longer existed. But the reporters in a note, say, "there is still this difference, that to determine a freehold interest, there must be an actual entry or something tantamount; but in the case of a chattel, any act shewing the intention of the lessor to insist on the forfeiture will be sufficient." In both cases, however, the entry, confessed by the defendant in the ejectment, will be sufficient. (*f*)

Forfeiture for non-payment of rent how enforced.

Where the landlord is about to enter for a forfeiture for non-payment of rent, *the common law* requires a previous demand of the rent due, with circumstances of great particularity. On the very day upon which the rent becomes due, at a convenient time, before sun-set, the lessor must make an actual demand of the exact amount of the rent due at the particular place at which the rent may be made payable by the terms of the lease; or, if there be no place stipulated in the lease, then at the most notorious place upon the land demised, which, if there be a dwelling-house, is the front door. (*g*) It may, however, be made by an agent duly authorized, and it is not necessary that he should shew his authority unless required to do so. (*h*) This demand must be made *in fact*, and so averred in pleading, although there should be no person on the land ready to pay it. (*i*) And in an old case it was said by *Popham, J.*, if the lessor come upon the land to demand his rent, and there meet J. S., a stranger, and say to him, "Pay me my rent," this is not a good demand, for he hath mistaken the person, and J. S. is not chargeable; but in such a case a *general* demand of the

(*f*) *Vide*, 1 Saund. 287.

(*g*) Co. Lit. 202. *a*. Maund's case, 7 Rep. 28. Clun's case, 10 Rep. 129. *a*. Kidwelly v. Brand, Plowd. 70. Hill v. Grange, *ibid.* 712. *b*. Smith v. Bustard, 1 Leon. 141. Fabian v. Windsor, *ibid.* 305. S. C. Cro. Eliz. 209. Wood v. Chiver, 4 Leon. 179. Cropp v.

Hambledon, Cro. Eliz. 48. Scot v. Scot, *ibid.* 73. Duppa v. Mayo, 1 Saund. 287, n. (16). Kirby v. Green, Lutw. 1139. Doe dem. Forster v. Wandlass, 7 T. R. 117.

(*h*) Roe dem. West v. Davis, 7 East, 363.

(*i*) Kidwelly v. Brand, Plowd. 70. *a. b.* 1 Rol. Abr. 459, 8.

rent, without reference to any person not chargeable, had been good. (*k*) But it has been since ruled, that a demand of rent, *if made upon the land*, though made of a stranger, is a sufficient demand, and need not be *general* to sustain ejectment for a forfeiture. (*l*) If after this formal demand the tenant refuse or neglect to pay his rent, then the lessor's right to enter is complete: but if the lessee, at any time of the day upon which the rent becomes due, meet the lessor on or off the lands demised, and tender the rent, the forfeiture will be saved; so that the lessor cannot put his right in force until after the expiration of that day. (*m*)

The same ceremonies are required in order to enable the lessor to recover a *nomine pænæ*. The *nomine pænæ* is incident to the rent, and will descend with it. (*n*)

Nomine pænæ.

Where, however, a lease contains a proviso, that if the rent be in arrear for twenty-one days, the lessor may re-enter, "although no legal or formal demand should be made:" and the rent be in arrear for the time specified, an ejectment may be maintained without actual re-entry, and without any demand of the rent. (*o*)

When no demand necessary

If the proviso be that on re-entry the lessor shall have the premises as if the indenture had never been made, the lessor may, nevertheless after reentry, maintain an action of covenant for rent in arrear prior to the re-entry, the proper construction of the condition being that from the time of re-entry, the lessor shall again have the land. (*p*)

If in a lease there is a clause of forfeiture in case the rent

Where no sufficient distress.

(*k*) *Stweton v. Cushe*, Yelv. 36.

Eliz. 383.

(*l*) *Doe dem. Brook v. Brydges*, 2 D. & R. 29.

(*o*) *Doe dem. Harris v. Masters*, 2 B. & C. 490, *et vide* *Dormer's case*, 5 Co. 40. *Goodright v. Cator*, Doug. 477.

(*m*) *Ibid.* *Burrough v. Taylor*, Cro. Eliz. 462. *Vide* *Maund's case*, 7 Rep. 28. *b.* 1 Wms. Saund. 287. *b. note*.

(*p*) *Hartshorn v. Watson*, 4 Bing. 178. N. S.

(*n*) *Thinn v. Cholmeley*, Cro.

be in arrear fourteen days, and no sufficient distress be found on the premises, it will be sufficient to shew that there was no sufficient distress on any one day within the fourteen days, and that the rent is in arrear for fourteen days. (*q*)

What amounts
to a forfeiture.

In order to enforce a forfeiture there must be such a breach as it was the manifest intention of the parties to provide against. And, therefore, where a lease contained a proviso for re-entry, if the lessee committed waste to the value of ten shillings, and the lessor re-entered, and brought ejectment, in consequence of the tenant's having pulled down some old buildings, of more than ten shillings value, and substituted others of a different description; it was held that the waste contemplated in the proviso, was waste producing an injury to the reversion, and that it was a question for the jury, whether, under all the circumstances, such waste to the value of ten shillings had been committed. (*r*)

Equitable
deposit.
Insolvency.
Bankruptcy.

An equitable deposit of a lease is not a forfeiture under a condition *not to assign*. (*s*) Insolvency is a voluntary act, and creates a forfeiture under such a condition, (*t*) although bankruptcy does not.

Where a lease contained two clauses for re-entry, the one in case the yearly rent of 300*l.* was in arrear thirty days after it became payable; and the other, in case the yearly rent was in arrear, and which was stated to be payable half-yearly at Lady-day and Michaelmas. It was held that the landlord had a right to re-enter on non-payment of each half-year's rent, and that the former clause contained the description of the amount to be annually paid, the latter the times of payment. (*u*)

As before observed, the distinction between void and voidable is much lessened by modern decisions, which have established

(*q*) Doe dem. Smelt v. Fuchan, *supra*, p. 283
15 East, 286.

(*t*) Shee v. Hall, 13 Ves. 404.

(*r*) Doe dem. Earl of Darlington
v. Bond, 5 B. & C. 855.

supra, p. 286.

(*u*) Doe dem. Rudd v. Golding,

(*s*) Cocks *ex parte*, 2 Dea. 15, 6 Moore, 231.

that the effect of a condition making the lease void on a given event, is to make it void *at the option of the lessor*, in cases where the condition was introduced for his benefit. (*x*) But in a case in which leases of tolls were made *void* by the provisions of an act of parliament, in case the rent was not reserved in a particular manner, and a lease was granted contrary to the act, the clause in the act was held to be imperative in an action for the rent against a surety. (*y*)

The most common waiver of a breach of condition is by acceptance of rent accruing since the breach, from the tenant; but to make this a waiver, it is necessary that the lessor, at the time of *accepting* the rent, have knowledge of the condition having been broken. If with this knowledge he receive the tenant's rent, he again establishes the tenancy, which it was competent to him to have avoided, and precludes himself for ever from taking advantage of the tenant's misconduct. (*x*)

Waiver by
receipt of
rent.

Whether a *demand* for rent without its being paid by the tenant is a waiver, may be a question; but admitting such waiver, an agent making the demand must have a general authority to act as agent, or it must be proved the landlord had notice of the forfeiture. (*a*)

Demand.

The landlord's knowledge of unauthorized acts without interference will not preclude him on the ground of acquiescence. (*b*) In a case in which the lessee covenanted to

(*x*) Doe v. Bancks, 4 B. & Ald. 401. Daken v. Cole, 2 Russ. 170. Roberts v. Davey, 1 Nev. & M. 443. Doe dem. Nash v. Birch, 1 Mees. & W. 402, *et vide* Rede v. Farr, 6 Mau. & S. 121.

(*y*) Pearse v. Morrice, 2 Ad. & Ell. 84.

(*z*) Green's case, Cro. Eliz. 3. Marsh v. Curteys, Cro. Eliz. 528. Harvey v. Oswald, *ibid.* 553, 572. Whitchot v. Fox, Cro. Jac. 398. Anon. 3 Salk. 2, 3. Goodright

dem. Walker v. Davids, Cowp. 804. Roe dem. Gregson v. Harrison, 2 T. R. 425. Goodright dem. Charter v. Cordwent, 6 T. R. 220. Doe dem. Joliffe v. Sybourn, 2 Esp. 679. Doe dem. Sheppard v. Allen, 3 Taunt. 78. Doe v. Pritchard, 2 Nev. & M. 489.

(*a*) Doe dem. Nash v. Birch, 1 Mees. & W. 402.

(*b*) Doe dem. Shephard v. Allen, 3 Taunt. 78.

erect certain houses within twelve months, and the steward of the lessor after there was a clear ground of forfeiture, allowed the lessee to complete the buildings, it was held the right of re-entry was not waived. (*b*)

If there be a breach of a condition that the lessee shall not assign, and the lessor accept rent from the assignee, this is a waiver of the forfeiture for that turn. (*c*)

Under a proviso that the lease shall become voidable on the insolvency or bankruptcy of the tenant, if the landlord accept rent after the tenant's discharge under the Insolvent Act, this is a waiver of the forfeiture. (*d*)

But to operate as a waiver of the forfeiture it must be an acceptance of rent which has accrued *since* the lessor's right of entry. For the lessor may receive the rent already due, and yet enter for the condition broken. (*e*) And so he may receive part of the rent and enter for the nonpayment of the residue. (*f*) Or if he bring an action for the rent due at the time when the forfeiture accrued, it is no waiver of his right to enter. (*g*)

By distress.

If, however, after the forfeiture, the landlord *distrain* for rent, previously due, he thereby affirms the possession of the lessee, and waives his right of entry. (*h*) It was considered to have been decided that the lessor did not waive his right of re-entry on a forfeiture incurred by non-payment of rent by taking an *insufficient* distress for that rent: (*i*)

(*b*) Doe dem. Lord Kensington v. Brindley, 12 Moore, 37.

(*c*) Whitchot v. Fox, Cro. Jac. 398.

(*d*) Doe dem. Gatehouse v. Rees, 4 Bing. 384. N. S.

(*e*) Co. Lit. 211. *b*. Greene's case, 1 Leon. 262. Anon. 3 Salk. 3.

(*f*) Year Book, 10 Hen. VII. 24. *a*.

(*g*) Co. Lit. 211. *b*. Pennant's case, 3 Rep. 64. Greene's case, 1 Leon. 262. 3 Salk. 3.

(*h*) *Vide supra*.

(*i*) Brewer dem. Lord Onslow v. Eaton, cited 6 T. R. 220.

but it now appears from the note in *Adams on Ejectment*, (m) that the principle of that decision must be limited to cases arising under the 4 Geo. II. c. 28; and, therefore, the mere act of taking even an insufficient distress, is a waiver of the right of re-entry at common law.

If the landlord enters for a distress *before* the period arrives at which he has a right of re-entry for condition broken, he will not thereby waive his right of re-entry, although he continues in possession beyond that period. (n)

In a case in which a lease contained a general covenant by the tenant to repair; and a distinct stipulation, that the tenant, within three months from notice being served upon him by the landlord, should repair all defects specified in the notice, with the usual clause of re-entry, the landlord served him with notice to repair *forthwith* agreeably to the covenant in the lease, and afterwards brought an ejectment *within* three months. It was held that the notice was no waiver of the forfeiture under the general covenant to repair. (o)

But the doctrine in the last mentioned case must be received with great caution, for in a case argued in the King's Bench, where a lease contained similar covenants, to keep the premises in repair generally, and to repair within three months after notice, and a clause of re-entry for a breach of covenant; the premises being out of repair, the landlord gave notice to repair *within three months*. The Court held, that this was a waiver of the forfeiture incurred by breach of the *general* covenant to keep the premises in repair, and amounted to a declaration that the landlord would be satisfied if the premises were repaired within three months, and that he thereby precluded himself from bringing an ejectment before the expiration of that

(m) P. 174, 3rd edit.

(o) Roe dem. Goatly v. Paine, 2

(n) Doe dem. Taylor v. Johnson, Campb. 520.

1 Stark. 411.

period. (o) The Court distinguished this case from *Doe v. Paine*, on the ground of the word "forthwith" being in the former notice, which shewed he did not mean to bind himself, not to proceed for the forfeiture for any given period. The doctrine in *Doe v. Meux*, has been recognized in subsequent cases, by which it has been decided, that the enlargement of the time given for repair is only a suspension, and not a waiver of a forfeiture. (p)

If evidence can be adduced, shewing the consent of the lessor, the forfeiture will, of course, be waived, as where in an agreement enuring as a lease, but not under seal, it was "stipulated and *conditioned* that the lessee should not underlet." It was held that these words created a condition; upon breach of which the lessor might maintain ejectment, without an express clause of re-entry; but that the lessor having said to the defendant in conversation, "Let the land, and I shall know what it will produce next year," he could not afterwards insist upon the forfeiture. (q)

A notice to quit at the end of half a year, given after breach of condition, may also amount to a waiver of forfeiture. (r)

The act by which the forfeiture is waved must amount to an affirmance of the tenancy, or a recognition of its continuance: it is not enough that the lessor knows of the breach without availing himself of his right of re-entry. Where, therefore, the lessee carried on a trade upon the demised premises, by which his lease was forfeited, the Court of Common Pleas held, that the landlord had not waived his right to enter for the forfeiture by lying by and witnessing the act for six years. (s)

(o) *Doe dem. Morecraft v. Meux*, 4 B. & C. 606.

(p) *Vide Doe dem. Rankin v. Brindley*, 4 B. & Ad. 84. *Doe dem. De Rutzen v. Lewis*, 5 Ad. & Ell. 277.

(q) *Doe dem. Henniker v. Watt*,

1 Man. & R. 694; 8 B. & C. 308.

(r) *Doe dem. Scott v. Miller*, 2 C. & P. 348.

(s) *Doe dem. Sheppard v. Allen*, 3 Taunt. 78, *et vide Doe dem. Kensington v. Brindley*, 12 Moore, 37.

And though where the breach of covenant is complete at once, the forfeiture is altogether waived by any subsequent recognition of the tenancy, yet it is otherwise if there be a *continuing* act of forfeiture. Thus, where the covenant was, that rooms should not be used for certain purposes, it was held there was a breach of the covenant every day during the term they were so used, and that the lessor was not precluded by receiving rent subsequent to the commencement of such user from taking advantage of such forfeiture, provided the user continued after the payment of the rent. (s)

It has been already explained, that if a condition is dispensed with wholly, or in part, or in favor of a particular individual, it is for ever gone; (t) but a chattel interest may be defeated by a defeasance subsequent. (u)

VI. By merger.

VI. By merger.

The estate for life, or term of years, may also be extinguished by merger;—that is, by the uniting of the greater with the less estate in the same person, without any intervening estate; (uu) as if there be tenant for life or years, and the reversion in fee simple descend to, or is purchased by him, the estate for life or years is *merged* or drowned in the inheritance, and thereby perpetually extinguished. (v) And so if there be joint-tenants for life or years, and the inheritance be purchased by or descend to one of them, his former estate is merged in the inheritance, and the joint tenancy thereby severed. (w)

If tenant in fee grants a lease for twenty-one years, and his lessee underlets for the whole term, wanting a few days, at an improved rent, and afterwards grants the underlease and improved rent to his own lessor for the term mentioned in the underlease, the reversionary interest for the few days

(s) Doe dem. Ambler v. Wood-bridge, 9 B. & C. 376.

(t) *Vide supra*, 289.

(u) *Vide infra*, p. 402.

(uu) Duncomb v. Duncomb, 3 Lev. 437.

(v) 2 Bl. Com. 177.

(w) Wiscot's case, 2 Rep. 60.

will remain outstanding, and will prevent the merger; and if the lessor convey all his estate in the premises to a third party, not only the inheritance, but also the chattel interest will pass, and the grantee from the landlord will be enabled to sue the underlessee on the covenants in the underlease. (y)

To effect a merger, it is in general necessary either that both the less and the greater estates should vest in the lessee *in the same right*; or that he should have the less estate in his own right, and the greater estate *in autre droit*. For if he have the less estate *in autre droit*, and the greater in his own right, there will be no merger. (z)

For example; if A. be tenant for term of years and the fee-simple descend to him, the term is merged; both estates being vested in him in the same right. If a man be lessee for years, and marry the lessor, and so have the less estate in his own right, and the greater estate in right of his wife, his term is merged. (a) If a master of an hospital, being a sole corporation, by consent of his brethren make a lease for years of part of the possessions of the hospital, and the lessee afterwards become master, the term is merged; the less estate being vested in him in his own right. (b)

It is laid down, that if one who has a lease for years as executor *purchase* the inheritance, this merges the term, because the purchase was his own act; (c) but the term continues assets for the benefit of creditors and legatees, (d) and since the act passed, making executors trustees for the persons entitled to the residue under the Statute of Distributions, (e) the term must also subsist for their benefit.

(y) *Burton v. Barclay*, 7 Bing. 746.

(z) Co. Lit. 338. b.

(a) Co. Lit. 338. b. And see *Lichden v. Winsmore*, 1 Rol. Abr. 934. l. 16, and *Lady Platt v. Sleaf*, Cro. Jac. 275. S. C. 1 Bulstr. 118. *Young v. Radford*, Hob. 3. And

Bac. Abr. *Leases*. (R.)

(b) Co. Lit. 338. b. *Secus*, if it had been a corporation aggregate, *ibid.*

(c) 4 Leon. Pl. 102.

(d) 3 Leon. 112, *Vincent Lee's case*.

(e) 1 Wm. IV. c. 40.

If the inheritance *descends* to the executor, there will, it seems, be no merger. (*d*)

If the lessor take the lessee to wife, or if the lessee make the lessor his executor, the term is in neither case merged: because the less estates are respectively vested in the husband and the executor *in autre droit*, and they have the remainder in their own right, (*e*) or does it seem to be a case of merger if the inheritance descends or comes to the wife *after* the marriage. (*f*)

If the lessor mortgage his reversion in fee to the lessee for years, the term becomes thereby merged; and shall not revive at law, by performance of the condition and payment of the mortgage money. (*g*) But equity would, doubtless, interfere, and make the mortgagor do right by re-granting the term.

VII. By surrender.

VII. By surrender.

A lease for life or years may be determined by a surrender, which is defined to be "a yielding up of an estate for life or years to him that hath the *immediate* reversion or remainder, wherein the particular estate may merge or drown by mutual agreement between them." (*h*) So that he to whom the surrender is made must necessarily have an estate larger than he hath who makes it, and in which the estate surrendered may merge; therefore, the lessee for life cannot surrender to lessor for years; (*i*) but a lessee for years may surrender to him who has the reversion only for years: (*k*) and if a reversioner make a lease for years of his reversion, the lessee in possession, though he hath a greater term than the lessee of

(*d*) See Bacon's Abr. *Leases* (R.) Bro. Abr. *Leases*, 63. Surrender, 52.

(*e*) Co. Lit. 338. *b*. Bracebridge v. Cooke, Plowd. 418. *b*. Anon. 4 Leon. pl. 102.

(*f*) Bac. Abr. *Leases* (R.)

(*g*) Anon. 3 Leon. 6.

(*h*) Co. Lit. 337. *b*.

(*i*) Perk. s. 589.

(*k*) Hughes v. Robotham, Poph. 30. S. C. Cro. Eliz. 302. Dighton v. Grenvil, 2 Ventr. 321, 327. And see Porry v. Allen, Cro. Eliz. 173. S. C. 1 Leon. 303.

the reversion has, (as if the term be for twenty years, and the lessee of the reversion have a lease for ten years,) may nevertheless surrender to the lessee in reversion; for the term in possession will not merge in the term in reversion, but in the inheritance. (i)

Underleases.

An assignment for the purpose of a surrender by a lessee will not defeat his underleases. (k)

Copyholder.

In a case in which copyholder for lives made a lease, (although not warranted by the custom,) and afterwards surrendered to the lord of the manor; it was held that the lease bound the lord of the manor, deriving title through the copyholder, and should have continuance during the existence of a remaining life, notwithstanding the surrender. (l)

Administrator
de son tort.

Where an administrator *de son tort verbally* agreed to surrender, and give up the possession to the landlord, it was held he was not estopped from again obtaining possession after he had taken out letters of administration. (m)

Sequestrators.

Sequestrators from the Court of Chancery take no legal estate, and, therefore, are not entitled to take a surrender. (n)

A surrender is either in fact or in law. (o)

1. Surrender
in fact.

1. A surrender in fact is made by express words, clearly manifesting the intention of the lessee to yield up his interest. (p) At common law an express surrender of things lying in grant could be made by deed only: (q) but a surrender of things lying in *possession* might be made by *parol* without livery of

(i) Cro. Eliz. 302. *Challoner v. Davies*, Ld. Raym. 402, *sed vide* Co. Lit. 273. b.

(k) Shep. Touch. 301.

(l) Doe dem. *Beadon v. Pyke*, 5 Mau. & Sel. 147.

(m) Doe dem. *Hornby v. Glen*, 1 Ad. & Ell. 49.

(n) *Cornish v. Searell*, 8 B. & C. 471; 1 Man. & R. 703.

(o) Co. Lit. 338. a.

(p) The word "surrender," is not necessary; but any words will do expressive of the intention. Ld. Raym. 402.

(q) Co. Lit. 338. a.

seisin or other formal mode of conveyance; though the particular estate had been originally created by deed; for it was but a restoring of the estate back again to him in the reversion or remainder. (s) But by the Statute of Frauds it is enacted, that "no leases, estates, or interests, either of freehold or terms for years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be surrendered, unless it be by deed or note in writing, signed by the party so surrendering the same, or his agent thereunto lawfully authorized by writing; or by act and operation of law." (t) Now, therefore, a surrender of things lying in possession cannot be made by parol: but though a surrender of things lying in *grant* must still be made by deed, a *note in writing* will be sufficient to effect a surrender of things lying in possession. (u)

The statute extends to tenancies from year to year, and such a tenancy is not determined by a mere parol license from the landlord to quit in the middle of a quarter, and the tenant quitting accordingly. (v) Although such license, accompanied by some act of the landlord, indicating his acceptance of possession, may, together, operate as a surrender by act and operation of law. (w)

By tenant from year to year.

Where the tenant agrees to surrender his lease for a particular purpose, which purpose is not effected, such conditional agreement will not operate as a surrender. As where a tenant from year to year, in consequence of his rent being in arrear, entered into an agreement by deed with the landlord reciting the tenancy, the arrears of rent, and that *he had agreed to quit and deliver up the premises*, to

Conditional surrender.

(s) Co. Lit. 338. a. 2 Rol. Abr. l. 24. Wilston v. Pinkney, 1 Ventr. 242. Cartwright v. Pinkney, *ibid.* 272.

(v) Mollett v. Brayne, 2 Campb. 103. Doe dem. Read v. Ridout, 5 Taunt. 519. Whitehead v. Clifford, *ibid.* 518.

(t) 29 Car. II. c. 3, s. 3.

(w) Vide Grimman v Legge, 8 B. & C. 325, *et vide infra*.

(u) Farmer dem. Earl v. Rogers, Wils. 26.

have his effects valued and assigned to a trustee for payment of the rent, and then by deed assigned his effects accordingly, but had never quitted possession, nor had his effects ever valued; the Court of King's Bench held that the agreement was merely conditional; and that never having been acted upon, it did not operate as a surrender. (x)

But where a tenant from year to year entered into an agreement in writing during a current year, for a lease to be granted to him and A. B.; and from that time A. B. *entered and occupied* jointly with him. It was held that the new agreement, coupled with the joint-occupation under it, determined the former tenancy, and, although the lease contracted for was never granted, operated as a surrender. (y)

An agreement in writing between landlord and tenant that the landlord should have immediate possession (except as was mentioned) of a farm, lands, and premises, which had been occupied by the tenant for a term, the landlord to take the stock, and the tenant to hold over half the house, half the stable, the barns and an inclosed ground, and to have the joint use of the yard with the landlord or incoming tenant, till the 25th January following, without rent, &c., was held to operate as a surrender. (x) And to have been properly rejected, as evidence, having only a 20s. stamp, and not a stamp of 1l. 15s., as required by the stamp act on a surrender.

Cancellation
or rasure of
deed will not
operate as a
surrender.

The rasure or cancellation of a lease will not operate as a surrender or extinguishment of the estate. Even before the Statute of Frauds, it seems to have been held, that where a thing lying in livery was granted by deed, as the deed was not the essence of the grant, its destruction would not follow upon the destruction of the deed; though it was agreed to be otherwise of things lying in grant, the conveyance

(x) *Coupland v. Maynard*, 12 East, 134.

(y) *Hamerton v. Stead*, 3 B. & C. 478.

(x) *Williams v. Sawyer*, 3 Brod. & Bing. 70. And see *Parmenter v. Webber*, 2 Moore, 656.

of which could consequently only be evidenced by the deed. (b) And since the statute, Lord C. B. *Gilbert* has delivered it as his opinion, "that a lease for years cannot be surrendered by *cancelling* the indenture without writing; because the intent of the statute was to take away the former method of transferring interests in lands by signs, symbols, and words only; and as livery of seisin on a parol feoffment was a sign of passing the freehold before the statute, but is now taken away by it, so the cancelling of a lease was a sign of surrender before the statute; but it is now taken away, unless there be a *writing* under the hand of the party. And the words 'by act and operation of law,' are to be construed a surrender in law by taking a new lease, which, *being in writing*, is of equal notoriety with a surrender in writing." (c) And this opinion has been fully confirmed by the solemn decision of the Court of King's Bench. (d)

In a recent case it was decided that the production of a lease by the lessor, in a cancelled state, was not even *prima facie* evidence of a surrender by deed, or note in writing, (e) although the fact of cancellation will be strong corroborating evidence in aid of other proof, such as the granting of a new lease to other parties. (f)

2. A surrender in law is where the parties, without any express surrender, do an act so inconsistent with the subsisting relation of landlord and tenant, as to imply an intention that the lessor should be in the same situation as if an express surrender had been made.

2. Surrender by act and operation of law.

If the lessee take a *new lease* of his lessor, he thereby admits that the lessor is as much in a condition to grant a new

The acceptance of a new lease by the lessee.

(b) See this discussed in *Miller v. Maynwaring*, Cro. Car. 399.

(c) *Magennis v. M'Cullough*, Gilb. Eq. Ca. 236.

(d) *Roe dem. Earl of Berkeley v. Archbishop of York*, 6 East, 86.

(e) *Doe dem. Constance v. Thomas*, 9 B. & C. 288.

(f) *Walker v. Richardson*, 2 Mees. & Wels. 882, *et vide* *Wootley v. Gregory*, 2 Y. & J. 536.

lease as if the old lease had been expressly surrendered; (*h*) except, it seems, in the case of the king, for a grant of a new lease from him is not a surrender of an old lease. (*i*)

If, therefore, lessee for life accept a lease, though but for years; (*k*) or lessee for a long term of years, as forty, accept a lease for a shorter term, as twenty years; (*l*) or if either of them accept a lease at will; (*m*) the law implies that the old lease is surrendered. And though the new lease be to commence *in futuro*, as at Michaelmas next, it will operate as an immediate surrender of the first lease; (*n*) and so where a lease is made for years, to commence at Michaelmas, and before that time the lessee accepts a lease to commence prior to *Michaelmas* or at Michaelmas, the first lease will be surrendered in law. But there cannot be a surrender to *operate in futuro*. (*o*)

It has been decided, if the lessee underlets, and afterwards becomes bankrupt, and his interest is sold to a third party who accepts a new lease, on which the first lease is cancelled, the cancellation of the old lease, and grant of the new lease, do not operate as a surrender of the interest of the first lessee. (*p*)

A surrender in law is sometimes of greater force than a surrender in deed. For where a lease is to begin at *Michaelmas* next, as this is a mere future interest, it cannot

(*h*) Fulmerstone v. Steward, Plowd. 106. *a.* 107. *b.* Mellow v. May, Moore, 636. 2 Rol. Abr. 495. l. 41.

(*i*) Brook v. Goring, Cro. Car. 197.

(*k*) Bernard v. Bonner, Aleyn, 59. And so in the case of tenancy *at will*, a new contract, as an agreement to purchase, will operate as a determination of the will. Peacock v. Peacock, 16 Ves. 57.—Daniels v. Davison, *ibid.* 253.

(*l*) Whitley v. Gough, Dyer, 140. *b.* Ives v. Sams, Cro. Eliz. 522. S. C. 5 Rep. 11. Gybson v. Searles, Cro. Jac. 84.

(*m*) Mellow v. May, Moore, 637. S. C. Cro. Eliz. 873.

(*n*) *Ibid.* Ive's case, 5 Rep. 11. *b.* Thompson v. Trafford, Poph. 8. Hutchins v. Martin, Cro. Eliz. 605.

(*o*) Doe dem. Murrell v. Milward, 3 Mees. & Wels. 328.

(*p*) Wootley v. Gregory, 2 Y. & J. 536.

be expressly surrendered, because there is no reversion wherein it may be merged; but by a surrender in law it may be merged. (*q*)

Although a corporation cannot make an actual surrender of a lease unless by deed under their seal, yet if they accept a new lease, this is a surrender in law of their first lease, and may be without writing. (*r*)

The new lease operates immediately as a surrender of the old one. But where a second lease for years was made to commence upon the death of J. S., it was holden to be no surrender of a former term; because J. S. might survive the term:—but if J. S. should die within the term, that then it would immediately operate as a surrender. (*s*)

Though the new lease be granted conditionally, it will operate as a surrender in law. As if a man make a lease for forty years, and the lessee afterwards take a lease for twenty years, upon condition that if he do a particular act the second lease shall be void, and the lessee afterwards break the condition, so that the second lease becomes void; the first lease is nevertheless surrendered. (*t*) And so if a man make a lease for forty years, and the lessor grant the reversion to the lessee upon condition, and then the condition be broken, the term is absolutely surrendered and gone. (*u*) And this constitutes the distinction between a new lease by the lessor upon condition, and a surrender by the lessee upon condition; in the first of which cases, though the condition be broken, the first lease is nevertheless gone; whereas in the second the breach of the condition restores to the lessee his original estate. (*v*)

But the second lease which is thus to work a surrender,

(*q*) Co. Lit. 338. *a*. Lampet's case, 10 Rep. 52. *b*. Case of Churchwardens of St. Saviour, Southwark, *ibid.* 66. *a*. *Contrà*, two judges against one. Year Book, 37 Hen. VI. 18. *a*.

(*r*) Bac. Abr. *Corporation*, (E. 3).

(*s*) Anon. 4 Leon. 30. pl. 38.

(*t*) Co. Lit. 218. *b*. Plowd. *ub. sup.*

(*u*) *Ibid.*

(*v*) *Ibid.*

must be good and valid in law; for if it be void, or not in accordance with the contract, the acceptance of it by the lessee is no surrender; (*u*) and it must be in writing to satisfy the Statute of Frauds. (*v*)

If a new lease be made to an infant, it is no surrender of a former lease, unless he assent to it when at full age. (*w*) But if a woman possessed of a term of years marry, and her husband accept a new lease, this is a surrender. (*x*)

A new lease made by, or to a person, *non compos*, is no surrender. (*y*)

It seems, that if a voidable lease is granted by a bishop, in consideration of the surrender of a prior lease, the first lease will not be revived by the avoidance of the second lease by the bishop's successor. (*a*)

If the lessee of the crown take a new lease of the same lands without a recital of the former lease, the second lease is void, and consequently the first is not surrendered. (*b*)

The second lease must be granted to the lessee in the same right as the first; for a lease to A. in trust for B. is no surrender of a prior lease to A. to his own use. (*c*)

A lease of lands was made by indenture for twenty-one years, with a proviso that it should be determinable by the lessor or lessee at the end of seven or fourteen years. Six

(*u*) Lloyd *v.* Gregory, Sir W. Jones, 405. Watts *v.* Maydwell, Hutt. 104. S. C. Lit. Rep. 279. Davison dem. Bromley *v.* Stanley, Burr. 2210. Doe dem. Earl of Berkeley *v.* Archbishop of York, 6 East, 86.

(*v*) 1 Wms. Saund. 236. (*b*.)

(*w*) Roll. Ab. 728. Lloyd *v.* Gregory, Cro. Car. 502. S. C. Sir W. Jones, 405.

(*x*) 2 Rol. Abr. 495. l. 49, *et vide* Mellow *v.* May, Moore, 637.

(*y*) Thompson *v.* Leach, Comb. 438, 468.

(*a*) Doe dem. Murray *v.* Bridges, 1 B. & Ad. 847.

(*b*) Wing *v.* Harris, cited Cro. Car. 198. S. C. Cro. Eliz. 231.

(*c*) Com. Dig. *Surrender* (I. 2.) Gie *v.* Rider, 1 Sid. 75.

years after the execution of the lease, a memorandum was indorsed upon the lease, stating, that "it had been agreed between the parties previously to the execution, that the lessor should not dispossess the lessee of the said estate, but suffer him to hold for the term of twenty-one years *from this present time*;" which memorandum was signed by the parties, and stamped with a lease stamp, but not sealed. The Court held that, whatever might have been the effect of the memorandum to operate as a surrender of the first lease, if the intention of the parties had been plainly to make a new lease, there was nothing from which such an intention could be collected. On the contrary, the intention was to take away from the lessor the power of determining the first lease, which the parties had not effectually done; inasmuch as the memorandum not being under seal, could not operate as a discharge of the condition which was under seal. (d)

An actual change of possession by mutual consent of landlord and tenant, will amount to a surrender of the term by act and operation of law. And this will be effected, whether the possession is actually delivered up to the landlord himself or to another on his behalf. (e)

By change of possession.

In a recent case, (f) this doctrine was applied under rather special circumstances. A dwelling-house, with cottages, stable, yard, and garden had been agreed to be let by Reeve at an entire rent to Bird for seven years; Bird occupied the stable and yard only, a person named Prince occupied the dwelling-house, and the cottages were underlet to other parties. The lessee paid the whole rent for the premises during his occupation of the stable and yard, and in January, 1832, assigned all the premises to Bullock, who entered on those occupied by Bird. The landlord received rent from Bird up to the time that he left in the broken

(d) Goodright dem. Nicholls v. Mark, 4 M. & S. 30. See Williams v. Sawyer, 3 B. & B. 70.

(e) Vide Hall v. Burgess, 5 B. & C. 333. Reeve v. Bird, 1 C., M.

& R. 37, and see also the case of Mollett v. Grayne, 2 Campb. 103, and the note on that case in 2 Man. & Ryl. 438.

(f) Reeve v. Bird, *supra*.

quarter; Prince remained in possession of the dwelling-house, but the cottagers quitted their possession subsequent to the assignment to Bullock, on which the agent of the lessor let them to other persons. In January, 1833, the agent received rent from Prince for the dwelling-house, and from the new tenants of the cottages, describing the house and cottages as held of Reeve. It also appeared that in August preceding, the lessor (Reeve) had advertised the whole of the premises to be let or sold. Reeve afterwards brought an action of assumpsit against Bird for not keeping the premises in tenantable repair, and for rent for use and occupation, and it was held that the circumstances stated amounted to a surrender by act and operation of law.

The acceptance by the landlord of the key in the middle of a quarter will, it seems, stop him from demanding rent for the remainder of that quarter; (*g*) or if the rent is payable quarterly, for any part of the quarter. (*h*)

And the fact of the lessor actually letting the premises to another person with the consent of the tenant, will, in like manner, amount to a surrender of the tenancy by act and operation of law. (*i*)

On the like principle, if tenants holding from year to year under different landlords, agree to exchange with the consent of the agent of both landlords, and take possession, this will operate as a surrender of the old tenancies and as new demises. (*k*)

A mere agreement between landlord and tenant for the substitution of another tenant, without actual change of possession, will not, it seems, amount to a surrender in law,

(*g*) *Whitehead v. Clifford*, 5 Taunt. 518, *sed vide* *Brown v. Bur-*
tinshaw, 7 D. & R. 603.

(*h*) *Grimmann v. Legge*, 8 B. & C. 324. 2 Man. & Ryl. 438, *sed*

vide *Hall v. Burgess*, 5 B. & C. 332.

(*i*) *Walls v. Atcheson*, 11 Moore, 379. 3 Bing. 462. 2 C. & P. 268.

(*k*) *Bees v. Williams*, 2 C., M. & R. 581. 1 Tyr. & Gr. 23.

although a contrary opinion seems at one time to have prevailed, (d) nor will an act of possession by a landlord which may be referred to a different motive. (e)

On the principle before stated, of a surrender in law by change of possession, it was decided that where the lessee from year to year underlet, and the lessor accepted the under-lessee as tenant, which acceptance was afterwards assented to by the original lessee, this amounted to a virtual surrender of the lessee's interest by act and operation of law. (f) On the same principle it has been decided by the Court of Exchequer, that the production from the custody of the lessor of an old lease cancelled, and proof of the custom to send old leases to his office, before a renewal was granted, and thereupon the old leases were cancelled by the lessor's officer, amounted to evidence on which a jury might presume that the lessee under the cancelled lease had assented to the grant of a new lease to a third party, so as to determine his interest by act and operation of law. (g)

Where the owner of a ferry demised it to A. by parol at a certain rent; and A. at the end of a few weeks, finding it unprofitable, proposed to become the servant of the owner as boatman, which was assented to, and A. served and received wages; the Court decided that there was a surrender of A.'s interest in the ferry, by act and operation of law. (h)

The agreement for substitution should be mutual, and sufficiently clearly expressed, or otherwise the tenant will not be discharged from his liability. Thus, where two persons, being partners, agreed to hold for three years certain, with power to extend the term to seven on notice. Before the expiration of the three years, or any notice being given, one of

(d) See *Stone v. Whiting*, 2 Stark. 235.

(g) *Walker v. Richardson*, 2

(e) *Griffith v. Hodges*, 1 C. & P. 419.

Mees. & W. 882.

(h) *Peter v. Kendal*, 6 B. & C.

(f) *Thomas v. Cook*, 2 B. & A. 703.

the partners retired, and another was admitted in his place. Notice was afterwards given by the continuing partner for an extension of the term, and the landlord by letter expressed himself willing to grant a lease to him and the new partner. But the letter was not communicated to the retiring partner, so that the agreement was not mutual, nor was any lease prepared; the landlord received the rent first from the continuing partner alone, and afterwards from him and the new partner. It was held the retiring partner was not therefore discharged from his liability to the rent during the remainder of the three years. (i)

If there is a fraudulent concealment on the part of the outgoing tenant, the tenancy will not be dissolved, as if he conceal the fact of the party introduced by him, having compounded with his creditors. (k)

In a case where a tenant held over after the determination of his term, and paid the next quarter's rent on the appointed day, and another person then occupied, and paid the rent for two years at irregular periods, it was held, that it was correctly left to the jury to decide whether there was sufficient evidence of a fresh tenancy, so as to liberate the first tenant from his liability to rent. (l)

A new lease of a part of the land demised by a former lease, operates only as a surrender *pro tanto*. (m) But if the lessee accept a grant of a rent-charge, or common, out of the land demised, or a lease *de vesturâ terræ*, to commence *in presenti*, or at a certain day within the term, this will be a surrender of his whole estate. (n) If, however, no time be specified from which such grant is to take effect, it is no surrender; but it will be intended that it should commence after the expiration of the term. (o) And so if the lessee

(i) *Graham v. Whichelo*, 1 Cr. & M. 188. 3 Tyr. 201.

(k) *Bruce v. Ruler*, 2 Man. & Ryl. 3.

(l) *Woodcock v. Nuth*, 8 Bing. 170. See 1 Moo. & Sc. 317.

(m) *Fish v. Champion*, 2 Rol. Abr. 498. l. 50.

(n) *Sible v. Searle*, 2 Rol. Abr. 496. l. 15, &c. S. C. (*Gybeon v. Searle*) Cro. Jac. 84, 177.

(o) *Ibid.* 2 Roll. Ab. l. 16.

accept a grant of any thing consistent with the lease of the land, it is no surrender. (*p*)

In a recent case, the tenant pleaded to an action of debt for rent in arrear, that it was mutually agreed that the defendant should deliver up possession; and in consideration thereof, should be discharged from all further rent, and that in pursuance of such agreement he did deliver up possession. It was held, that this did not raise the question of a surrender within the Statute of Frauds, but the defence was merely an executed contract, and was valid. (*q*)

It has been shewn that surrenders by operation of law are excepted out of the Statute of Frauds, and this exception seems to have been founded upon analogy to those cases in which, before the statute, a surrender in fact could have been made by deed only. As for instance, in the case of an office, which lying in grant can only be expressly surrendered by deed: but yet if the grantee of an office accept a new grant of the same office, this will be a surrender in law of the former grant. (*r*) And so in the case of a corporation aggregate, which can only make a surrender by deed;—yet if they accept a new lease of lands already demised to them, this is a surrender in law of the former lease. (*s*)

Where a tenant from year to year, holding from Lady-day to Lady-day, agreed *by parol*, with his landlord's agent, to quit at the ensuing Lady-day, which was *within* half a year; and the premises were re-let by auction (at which the tenant attended and bid,) but the new tenant was not let into possession; it was held that the tenancy was not determined: there not having been either a sufficient notice to quit, or a surrender by operation of law, within the meaning of the

(*p*) *Gybson v. Searls*, Cro. Jac.
84. *Jones v. Clerk*, Hardr. 47.

(*q*) *Gore v. Wright*, 8 Ad. & El.
118.

(*r*) *Woodward v. Aston*, 1 Vent.
297.

(*s*) *Case of Churchwardens of St.
Saviours, Southwark*, 10 Rep. 67. *b*.

Statute of Frauds ; (v) but if the irregular notice to quit had been by notice in writing, it might have amounted to a surrender. (w)

A redemise by the lessee to the lessor of the lands leased for the whole term originally granted, amounts to a surrender in law. (x) But, in order to work a complete surrender, it must be a redemise of the lessee's whole term and estate; and of all the lands originally leased: otherwise, it will be, in the first case, no surrender at all; (y) and in the other, only a surrender *pro tanto*.

Where a lease came into the hands of the original lessor by an agreement entered into between him and the assignee of the original lessee, "that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent annually towards the goodwill already paid by such assignee," this agreement was held to amount to a surrender of the whole term. (z)

Terms for years
may be defea-
sanced.

It remains to be noticed that chattel interests, as terms for years, may be defeasanced by deed, with the consent of those who were parties to the creation of the estate, (a) or, as it is presumed, of the persons in whom the respective estates and interests of such parties are vested at the time of making the defeasance; and, therefore, although, as before noticed, a condition is for ever gone by license once given, yet this may be remedied by a new defeasance by deed, executed by all proper parties.

(v) Doe dem. Huddleston v. Johnson, M'Clel. & Younge, 141. And see Johnstone v. Huddleston, 4 B. & C. 922. See also Hamerton v. Steed, and Grimman v. Legge, *supra*.

(w) Aldenburgh v. Peaple, 6 C. & P. 212.

(x) Lloyd v. Langford, 2 Mod. 174.

(y) Bacon v. Waller, 3 Bulstr. 203, 204. 2 Rol. Abr. 497. l. 29. 498. l. 6.

(z) Smith v. Mapleback, 1 T. R. 441.

(a) Shap. Touch. 396, 398.

CHAPTER THE SECOND.

Of the Tenant's Duties upon the expiration of the Tenancy, and the Consequences of holding over.

WHEN the tenancy has expired, the lessee is bound peaceably and quietly to deliver up to the lessor the possession of the premises; together with all buildings, fixtures, &c., which he may have erected during the term; excepting such fixtures as have been already noticed. (a)

The lessee is bound to deliver up the premises.

The tenant is bound to preserve the boundaries, and if he permit them to be destroyed so that his landlord cannot distinguish them from the tenant's, he shall restore the land specifically, or give other land of equal value, to be ascertained and fixed by a commission appointed by the Court of Chancery. (b)

To preserve boundaries.

Where the lessee has encroached upon the waste, and added his encroachment to the premises demised, it seems to be settled that the lessor shall have the benefit of it, and that the lessee will be bound to deliver it up at the expiration of his tenancy, unless in order to prevent the conclusion of law that the encroachment is for the landlord's benefit, the tenant at the time of making it, shews by some clear act that he intends it for his own use. (c)

To deliver up land added to the demised premises by encroachment.

Lord Kenyon appears, indeed, to have entertained a con-

(a) *Supra*, p. 234, 235.

Parkinson, 1 Swanst. 9.

(b) *Attorney General v. Fullerton*, 2 Ves. & Bea. 263. *Willis v.*

(c) *Vide Doe dem. Challnor v. Davies*, 1 Esp. N. P. 462.

trary notion, on the ground that the tenant might thereby make his landlord a trespasser; (d) but this opinion has not been acquiesced in by subsequent judges. (e)

And Mr. Baron *Parke* is reported to have said, "it is clearly settled that encroachments made by a tenant are for the benefit of the landlord, unless it clearly appear, by some act done at the time of the encroachment, that the tenant intended the encroachment for his own benefit, and not to hold, as he held the farm, to which the encroachment was adjoining." (g)

Double value. The tenant's neglect to deliver up the demised premises will subject him to penalties imposed by the legislature. By the statute, 4 Geo. II. c. 28, s. 1, it is enacted, "that in case any tenant or tenants for any term of life, lives, or years, or other person, or persons, who are, or shall come into possession of any lands, tenements, or hereditaments, by, from, or under, or by collusion with, such tenant or tenants, shall *wilfully* hold over any lands, tenements, or hereditaments, after the determination of such term or terms, and *after demand made, and notice in writing given* for delivering the possession thereof, by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements, or hereditaments shall belong, his or their agent or agents thereunto lawfully authorized; then and in such cases such person or persons so holding over shall, for and during the time he, she, and they, shall so hold over, or keep the person or persons entitled out of possession of the said lands, tenements, and hereditaments as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of *double the yearly value* of the lands, tenements, and hereditaments, so detained for so long time

(d) Doe dem. Colclough v. Mulliner, 1 Esp. N. P. 461.

dem. Child v. Winwood, 1 Taunt. 208.

(e) *Vide* Doe dem. Challnor v. Davies, 1 Esp. N. P. C. 461. Bryan

(f) Doe dem. Lewis v. Roes, 6 C. & P. 610.

as the same are detained, to be recovered in any of his Majesty's courts of record *by action of debt*, whereunto the defendant or defendants shall be obliged to give special bail; against the recovering of which said penalty there shall be no relief in equity."

A weekly tenant is not within the statute; (*h*) nor, consequently, it is presumed, is a monthly tenant. The question has been recently agitated, whether a quarterly tenant is within the statute, but the point was left undecided; *Tindal*, C. J., saying, "I do not affirm or deny that the statute of Geo. II. applies to a holding by the quarter." (*i*)

Who are not
tenants within
the statute.

The statute uses the words "*wilful*" holding over, and extends only to cases in which the tenant has been guilty of fraud or contumacy, and not to cases in which the tenant maintains possession *bond fide*, upon any fair ground of defence. Thus it is said to have been held by Lord *Mansfield*, that where there had been a treaty for a further term between the landlord and tenant, which afterwards went off, the tenant who had held over during the treaty was not within the meaning of the statute. (*k*)

So where tenant in fee had made a lease for twenty years to A., and then made his will, by which he devised the premises so leased to B. for life, with power to make leases upon particular conditions, remainder over to C.; and A., after the death of tenant in fee, surrendered his lease to B., who thereupon, in the supposed execution of his power, made a new lease to A. and died, upon which C. entered, and received rent from A. down to the time at which the first lease would have expired, and then upon the ground that the new lease was not conformable to the power, and therefore void, gave notice to A. to quit the premises; whereas A. contended that the new lease was made conform-

(*h*) *Lloyd v. Rosbee*, 2 Campb. 453, *et vide* *S. P. Sullivan v. Bishop*, 2 C. & P. 359

(*i*) *Wilkinson v. Hall*, 3 Bing. 531. N. S.

(*k*) *Anon.* 5 Esp. 215, 216.

ably to the power, and drove C. to try the question upon an ejectment, by which C. recovered the possession of the premises; and then brought debt upon the statute for double value, for the time which A. had held between the date of C.'s notice and his having recovered the lands; the Court of Exchequer decided, that as there was no fraud or contumacy in the tenant, but the holding over was under a fair claim of right, the statute did not apply; and they ordered the *postea* to be delivered to the defendant. (*l*)

Notice includes demand.

Upon the words in the statute "*demand made, and notice in writing given,*" it has been held, that the notice includes the demand; and consequently, though a demand ought to be stated in the declaration, proof of service of a notice in writing will be sufficient proof of a demand. (*m*)

But a *notice* is necessary in all cases in which the landlord would avail himself of the statute; for though, where premises are demised for a term certain, no notice is required to put an end to the tenancy, (*n*) yet the tenant who holds over beyond the term can only be charged for double value from the time at which the notice was served. (*o*)

The notice ought regularly to be given *before* the expiration of the term, and the landlord will then be entitled to recover double value as from the time at which the term expired. (*p*)

It may, however, be given after the expiration; and if the landlord have done no act to acknowledge the continuation of the tenancy, he will be entitled to double value, as from the time of the notice or demand; but if the rent were before reserved quarterly, and such demand be made in the middle

(*l*) Wright v. Smith, 5 Esp. 203.

(*m*) Wilkinson v. Colley, Burr. 2694.

(*n*) *Supra*, p. 33.

(*o*) Cobb v. Stokes, 8 East, 358.

(*p*) Cutting v. Derby, Bl. Rep. 1075.

of a quarter, the landlord cannot recover single rent for the antecedent fraction of such quarter. (q)

Where notice to quit is given to the tenant, *a feme sole*, and she afterwards marries, the landlord may maintain debt for double value against the husband, without serving another notice upon him. (r)

A person appointed by the Court of Chancery to receive the rents and profits of an estate, is an agent *lawfully authorized* within the meaning of the statute. And, therefore, where a notice had been given by a receiver so appointed to receive the rents of an estate bequeathed in trust for infant children, it was held sufficient to enable the trustee and executor to recover double value against the tenant who held over after such notice. (s)

But the administrator of an executor cannot sue for the double value of lands held over after notice to quit, under a demise from the testator, without taking out an administration *de bonis non*, even though the tenant have attorned to him. (t) On the death of the executor intestate, the representation to the original testator ceases, and the administrator of the executor is a stranger to the estate. An administration *de bonis non* is, therefore, necessary to restore the personal representation to the original owner.

The landlord does not waive his right to sue for double value by bringing an ejectment against the tenant. The two remedies are perfectly independent of each other; and, therefore, although the lessor obtain possession of the premises demised by his ejectment, this does not affect his right to sue for the double value of the premises during the time for which the tenant held over, between the period of the

Right to double value not waived by ejectment.

(q) *Cobb v. Stokes*, *sup.* 2694.

(r) *Lake v. Smith*, 1 N. R. 174.

(t) *Tingrey v. Brown*, 1 B. & P.

(s) *Wilkinson v. Colley*, Burr. 310.

expiration of his notice, and the time when the possession was recovered. (*u*)

Contrà, by receiving rent.

If, however, the landlord, after the expiration of his notice, receive the single rent from his tenant, it is a question for the jury whether the notice is not thereby waived, and the tenancy re-established, in which case the landlord's right to sue for double value is gone. (*v*) And, on the other hand, the landlord, if he recover for the double value from the middle of a quarter, cannot recover his single rent for the antecedent fraction of such quarter. (*w*)

When the tenant holds over after notice by himself he will be liable for double rent.

By the statute 11 Geo. II. c. 19, s. 18, reciting "whereas great inconveniences have happened and may happen to landlords whose tenants have power to determine their leases by giving notice to quit the premises by them holden, and yet refusing to deliver up the possession when the landlord hath agreed with another tenant for the same," it is enacted, "that from and after the 24th day of June, 1738, in case any tenant or tenants shall give notice of his, her, or their intention to quit the premises by him, her, or them holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then the said tenant or tenants, his, her, or their executors or administrators, shall from thenceforward pay to the landlord, or landlords, lessor or lessors, *double the rent* or sum which he, she, or they, should otherwise have paid; to be levied, sued for, *and recovered* at the same times and *in the same manner* as the single rent or sum before the giving such notice could be levied, sued for, or recovered; and such double rent or sum shall continue to be paid during all the time such tenant or tenants shall continue in possession as aforesaid."

(*u*) *Soulsby v. Neving*, 9 East, 48, cited *post*. 310.

(*v*) *Doe dem. Cheny v. Batten*, 362. Cowp. 243. *Ryal v. Rich*, 10 East,

(*w*) *Cobb v. Stokes*, 8 East,

As this statute directs the double rent to be recovered in the same manner as the single rent, the landlord may maintain either debt, or, in the case of a parol demise, assumpsit, or he may distrain. (y)

A lease by parol is a *holding* within this statute. (x) And a *parol notice* to quit by such tenant is sufficient to make him liable for double rent in case he hold over. (a)

But, to bring the tenant within the statute, his notice must be direct and positive; for where tenant from year to year gave his landlord notice that he would quit upon a contingency, (*viz.*, *as soon as he could find another situation*), and he did afterwards get another situation, but neglected to quit the premises, Lord *Ellenborough*, C. J., ruled that the notice was too vague, and that the case did not come within the statute. (b)

And the statute applies to those cases only, in which the tenant has the power of determining his tenancy by a notice, and in which he actually does give a valid notice for that purpose. Therefore, where a tenant from year to year gave a parol notice to his landlord less than six months before the expiration of the current year, and the landlord accepted and assented to the notice, it was held that though the tenant held over after the expiration of the time mentioned in the notice, the landlord was not entitled to distrain for double rent. (c)

The tenant holding over after notice to quit, is only liable for double rent during his continuance in possession, and need not give a fresh notice to quit in order to get rid of his liability. (d)

(y) *Timmins v. Rowlinson*, Burr. 1603. S. C. Al. Rep. 533. *Wheeler v. Copeland*, 5 T. R. 364.

(x) *Timmins v. Rowlinson*, *supra*.

(a) *Ibid*.

(b) *Farrance v. Elkington*, 2

Campb. 591.

(c) *Johnstone v. Hudlestone*, 4 B. & C. 922.

(d) *Booth v. M'Farlane*, 1 B. & Ad. 904.

Difference between the two statutes.

The chief difference between these two statutes is, that in the case of the former the notice (which *must* be *in writing*, proceeds from the landlord; in the case of the latter, (where the notice *may* be by parol,) it is the act of the tenant; and that the one imposes double value by way of *penalty* and not *rent*; whilst the one still treats the party as tenant, and recognizes him by that name, which the other statute does not. This distinction is pointed out by Lord *Ellenborough*, in delivering his opinion in *Soulsby v. Neving*, that the landlord's having recovered in ejectment was no bar to his afterwards suing for the double *value*, his lordship observing) "that there might be some incongruity in applying the remedy for double *rent* after the remedy by ejectment, which treats the person in possession as a trespasser." (*f*)

If the lessor receive rent, a new tenancy is created,

and the parties will be presumed to hold under the old covenants.

Where the landlord suffers the tenant to remain in possession after the expiration of the tenancy, and receives rent from him, a new tenancy from year to year will be thereby established. (*g*) In this case, provided no new agreement be entered into, the law will presume, in the silence of the parties, that the tenant holds the premises subject to all such covenants contained in the original lease as apply to his present situation. Where, therefore, there have been in the lease covenants for a particular mode of husbandry, and after the expiration of the lease the tenant holds over and pays rent, the landlord may compel him to perform such covenants in the same manner as if they were still expressly agreed upon between them; (*h*) the remedies indeed will be altered, and instead of covenants, the landlord may bring an action on the case, stating the covenants, and averring an agreement to perform them.

And the tenant's liability will be continued, notwithstanding an undertaking on his part to pay a larger rent. Accordingly, where certain premises had been demised by

(*f*) 9 East, 314.

1 B. & Ad. 365.

(*g*) Bishop v. Howard, 2 B. & C. 100. Doe dem. Tucker v. Morse,

(*h*) Roe dem. Jordan v. Ward, 1 H. Bl. 99.

indenture for a term of years, and the lessee covenanted to keep the premises in repair, and likewise to insure them against fire; and, upon the expiration of the term, agreed with the heir of the lessor to continue tenant to him, paying a larger rent than had been reserved by the lease: nothing appearing as to any stipulation in respect of the covenants; and the premises were afterwards accidentally burnt down; Lord *Ellenborough*, C. J., held, that the tenant was bound to rebuild; and that the advance of rent made no difference; the terms of the old lease being incorporated with the new contract. (i)

And where a tenant held under an agreement for three years, at 45*l.* a-year, which expired at Midsummer, and at the expiration of his tenancy did not yield up possession, nor did his landlord take any immediate steps to compel him so to do, but at the Michaelmas following gave him notice to quit at Lady-day, or pay the rent of 50*l.* a-year and the tenant continued in, but refused to pay any more than the 45*l.* rent; the Chief Justice of the Common Pleas ruled, that under the circumstances, the tenant must be taken to have acquiesced in the new proposal, and was bound to pay the rent of 50*l.*, (k) and the Court of Common Pleas refused to disturb the verdict.

Where the tenant holds by lease or agreement in writing, the landlord is enabled, by the 1 Geo. 4, c. 87, to compel the tenant, before he is admitted to defend, to give security for damages and costs, and he may be also required to give further security against wasting or injuring the land between the time of trial and execution on judgment, as will be subsequently more fully stated.

The more recent statute of the 1 and 2 Vict. c. 74, intituled "An Act to facilitate the recovery of possession of tene- 1 & 2 Vict. c. 74.

(i) *Digby v. Atkinson*, 4 Campb. 275. *Torriano v. Young*, 6 C. & P. 8.

(k) *Roberts v. Hayward*, 3 C. & P. 432.

At will or term
not exceeding
seven years.

Rent not ex-
ceeding 20l.
without fine.

Landlord may
give notice of
intention to
proceed.

If tenant does
not show rea-
sonable cause.

Landlord may
give proof of
facts.

ments after due determination of the tenancy ; after reciting that it was expedient to provide for the more speedy and effectual recovery of the possession of premises unlawfully held over after the determination of the tenancy ; has enacted, that when and so soon as the term or interest of the tenant of any house, land, or other corporeal hereditaments held by him *at will*, or for any term *not exceeding seven years*, either without being liable to the payment of any rent, or at a *rent not exceeding the rate of 20l. a-year*, and upon which no fine shall have been reserved or made payable, shall have ended or shall have been duly determined by a legal notice to quit or otherwise, and such tenant or (if such tenant do not actually occupy the premises, or only occupy a part thereof) any person by whom the same, or any part thereof, shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be lawful for the landlord of the said premises, or his agent, to cause the person so neglecting or refusing to quit and deliver up possession, to be served (in the manner hereinafter mentioned) with a written notice in the form set forth in the schedule to the act, (a) signed by the said landlord, or his agent, of his intention to proceed to recover possession under the authority and according to the mode prescribed in the act, and if the tenant or occupier shall not thereupon appear at the time and place appointed, and shew to the satisfaction of the *justices* thereinafter mentioned, *reasonable cause* why possession should not be given under the provisions of the act, and shall still neglect or refuse to deliver up possession of the premises, or of such part thereof, of which he is then in possession to the said landlord, or his agent ; it shall be lawful for such landlord or agent to give to such justices proof of the holding and of the end or other determination of the tenancy with the time or manner thereof ; and where the title of the landlord has accrued since the letting of the premises, the

(a) See copies of this Form of Notice, and of the complaint to the justices in the Appendix.

right by which he claims the possession, and upon proof of service of the notice, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district, division, or place within which the said premises, or any part thereof, shall be situate in petty session assembled, or any two of them, to issue a warrant (b) under their hands and seals to the constables and peace officers of the district, division, or place within which the said premises or any part thereof shall be situate, commanding them within a period to be therein named, not less than twenty-one, nor more than thirty clear days from the date of such warrant, to enter (by force if needful) into the premises and give possession of the same to such landlord or agent. Provided that entry upon any such warrant, shall not be made on a Sunday, Good Friday, or Christmas day, or at any time except between the hours of nine in the morning and four in the afternoon; and, provided also, that nothing therein contained shall be deemed to protect any person on whose application and to whom any such warrant shall be granted, from any action which may be brought against him by any such tenant or occupier for or in respect of such entry and taking possession where such person had not at the time of granting the same lawful right to the possession of the same premises; and, provided also, that nothing therein contained shall affect any rights to which any person may be entitled as *outgoing tenant* by the custom of the country or otherwise.

and justices
may grant a
warrant.

Commanding
constables to
give possession.

Rights of out-
going tenant
saved.

“ And further, that such notice of application intended to be made under the act, may be served either personally or by leaving the same with some person being in and *apparently* residing at the place of abode of the person so holding over as aforesaid, and that the person serving the same shall read over the same to the person served, or with whom the same shall be left as aforesaid, and explain the purport and intent thereof. Provided, that if the person so holding

(b) See copy of this Form of Warrant in the Appendix.

over cannot be found, and the place of abode of such person shall either not be known or admission thereto cannot be obtained for serving such summons, the posting up of the said summons on some conspicuous part of the premises so held over, shall be deemed to be good service upon such person.

And further, that in every case in which the person to whom any such warrant shall be granted, had not at the time of granting the same, lawful right to the possession of the premises, *the obtaining* of any such warrant as aforesaid, shall be deemed a *trespass* by him against the tenant or occupier of the premises, although no entry shall be made by virtue of the warrant, and in case any such tenant or occupier will become bound with two sureties as thereafter provided, to be approved of by the said justices, in such sum as to them shall seem reasonable, regard being had to the value of the premises and to the probable cause of an action, to sue the person to whom such warrant was granted, with effect and without delay, and to pay all the costs of the proceeding in such action, in case a verdict shall pass for the defendant, or the plaintiff shall discontinue or not prosecute his action, or become nonsuit therein, execution of the warrant shall be delayed until judgment shall have been given in such action of trespass, and if upon the trial of such action of trespass a verdict shall pass for the plaintiff, such verdict and judgment thereupon shall supersede the warrant so granted, and the plaintiff shall be entitled to double costs in the said action of trespass.

And further, that every such bond as hereinbefore mentioned, shall be made to the said landlord or his agent at the costs of such landlord or agent, and shall be approved of and signed by the said justices, and if the bond so taken be forfeited, or if upon the trial of the action for securing the trial of which such bond was given, the judge by whom it shall be tried, shall not endorse upon the record in Court that the condition of the bond hath been fulfilled, the party

to whom the bond shall have been so made, may bring an action and recover thereon. Provided that the Court where such action, as last aforesaid, shall be brought, may, by a rule of Court, give such relief to the parties upon such bond as may be agreeable to justice, and such rule shall have the nature and effect of a defeazance to such bond.

And further, that it shall not be lawful to bring any action or prosecution against the said justices by whom such warrant as aforesaid shall have been issued, or against any constable or peace-officer by whom such warrant may be executed for issuing such warrant, or executing the same respectively, by reason that the person, on whose application the same shall be granted, had not lawful right to the possession of the premises.

And lastly, that where the landlord, at the time of applying for such warrant as aforesaid, had lawful right to the possession of the premises, or of the part thereof, so held over as aforesaid, neither the said landlord nor his agent nor any other person acting in his behalf shall be deemed to be a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the authority of the act, but the party aggrieved, may, if he think fit, bring an action on the case for such irregularity or informality in which the damage alleged to be sustained thereby, shall be specially laid, and may recover full satisfaction for such special damage, with costs of suit, provided that if the special damage so laid be not proved, the defendant shall be entitled to a verdict, and that if proved, but assessed by the jury at any sum not exceeding 5s., the plaintiff shall recover no more costs than damages, unless the judge, before whom the trial shall have been held, shall certify upon the back of the record that in his opinion full costs ought to be allowed.

CHAPTER THE THIRD.

*Of the Rights and Liabilities of outgoing Tenants,
after the dissolution of the Tenancy.*

After the expiration of the tenancy the tenant may re-enter,

THE tenancy being dissolved, and the lessee having quitted possession, certain rights appertain to him in reference to his late character of tenant.

1. to take away his moveables.

1. He has a right to a reasonable ingress upon the land, in order to remove his goods and utensils. (a) But he can then take away such goods only as are detached from the freehold; it having been already shewn that those fixtures which the law permits the tenant to remove must be removed before the expiration of the tenancy. (b)

2. Tenant at will and the representatives of tenant for life may enter and take emblements.

2. Tenant for life, his representatives, and under-tenants, and tenants at will, are entitled to the emblements; a privilege which the law allows them on account of the uncertain nature of their estates, lest they should be deterred from the proper cultivation of their lands. (c) And for the same reason, tenant for a term determinable upon a particular event will, in many cases, be entitled to emblements; (d) or if the term be determined by the will of another, as by the act of a parson resigning his living, in which case his lessee and under-tenants will be entitled to emblements. (e) And so tenant under an *elegit*, or by statute, whose interest may

(a) Lit. s. 69. 2 Bl. Com. 147.

(d) *Ibid.*

(b) *Supra*, p. 236.

(e) *Bulwer v. Bulwer*, 2 B. &

(c) Co. Lit. 55. b. *Knevett v.* A. 470.

Pool, Cro. Eliz. 463.

be determined by the satisfaction of the debt for which the land is bound, will be entitled to emblements. (*f*)

Emblements are the *annual* productions which are raised by the *labour of the tenant*, (*g*) such as corn, hops, flax, hemp, roots planted annually, and the like, (*h*) and can be claimed only of a crop, which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed, and, therefore, will not include a second crop of clover, although the first crop, taken at the end of the term, did not repay the expense of cultivation. (*i*) Such things as are not of annual growth, or do not require the labour of the tenant, but are the permanent and natural produce of the earth, are not included within the term *emblements*; and, therefore, trees, fruit, grass, &c., cannot be removed after the expiration of the tenant's interest. (*k*)

What are emblements.

Emblements may be taken in all cases where the tenancy is put an end to by the act of God. If, therefore, tenant for the life of the lessor, or of a stranger sow corn, &c., and before severance the lessor or stranger die, whereby the tenancy is extinguished, the lessee may, when the corn, &c., becomes fit to cut, enter into the land, and cut it. (*l*) So where tenant for his own life sows corn, and dies, his personal representatives may enter and cut it. (*m*) And by the statute, 28 Hen. VIII. c. 11, s. 6, ecclesiastical incumbents of benefices are empowered to bequeath by will the corn and grain which they may have sown on the glebe land. (*n*)

They may be taken where the tenancy is put an end to by the act of God,

The lessee will be entitled to emblements wherever the tenancy is put an end to by *act of law*. (*o*) If, therefore, a lease be made to husband and wife during coverture, and

or by act of law,

(*f*) Co. Lit. 55. b.

(*g*) *Ibid.*

(*h*) *Ibid.* 1 Rol. Abr. 728. l. 1.

Latham v. Atwood, Cro. Car. 515.
2 Bl. Com. 123.

(*i*) Graves v. Weld, 5 B. & Ad.
105. 2 Nev. & M. 725.

(*k*) Co. Lit. 55. b., *et vide supra*.

(*l*) *Ibid.*

(*m*) *Ibid.*

(*n*) *Vide* Mirehouse on Tithes,
p. 27.

(*o*) 1 Rol. Abr. 726.

they are divorced *à vinculo matrimonii*, the tenancy being dissolved by act of law, the husband may enter and take the emblements. (o)

or by act of
the lessor;

The lessee shall be entitled to emblements wherever the tenancy is put an end to by the act of the lessor. If, therefore, the lord enter upon tenant at will, or by any other means dissolve the tenancy, the tenant still retains his right to the emblements. (p) And so in the case of a tenancy from year to year, when the notice to quit proceeds from the landlord. (q) The tenant at will is also, it seems, entitled to enter for the removal of his goods, but he is not entitled *de jure* to retain possession for such purpose. (r)

But not where
the tenancy is
dissolved by
the tenant's
own act.

Where the tenancy is put an end to by the act of the tenant himself, he will not be entitled to emblements; (s)—whether the act be a direct or indirect dissolution of the tenancy. *Volenti non fit injuria*. (t) If, therefore, tenant at will determine the will, he has no right to emblements. (u) So, if the lessee is guilty of a breach of condition, and the lessor enter for the forfeiture, the lessee has no right to emblements. And where the tenant holds for a certain term, subject to be defeated upon a particular event, and such event is brought about by the act of the tenant, he can claim no right to the emblements; (v) as if the condition for re-entry be in case the lessee contract a debt, whereon he shall be sued to judgment and execution issue. (w) Or if land be leased to a widow for twenty years, *durante viduitate*, and she marry, and so determine the tenancy. (x) And where a disseisor sows corn, and then is ousted by the disseisee, he can have no claim to

(o) 1 Rol Abr. 726. 5 Co. Oland's case, 116, a.

(p) Lit. s. 69. Oland v. Burdwick, Cro. Eliz. 460.

(q) *Ibid.* 2 Bl. Com. 147.

(r) Doe dem. Nicholl and another v. M'Kaeg, 10 B. & C. 721.

(s) Bulwer v. Bulwer, 2 B. & Ad. 470.

(t) Co. Lit. 55. Oland v. Burdwick, Cro. Eliz. 460. S. C. 5 Rep. 116. a.

(u) *Ibid.*

(v) *Ibid.* 1 Rol. Abr. 726, l. 33.

(w) Davis v. Eyton, 7 Bing. 154.

(x) *Ibid.* Wicks v. Jordan, 2 Bulstr. 213.

emblements. (y) And where crops had been taken under an *habere facias possessionem*, issued on an ejectment, which had been brought against a tenant for holding over, the Court refused a rule for the lessors of the plaintiff to pay over the value of the crops to the defendant, after deducting the amount of rent due. (z) But though the law in these latter cases gives no indulgence to the tenants themselves; yet to their under-tenants, who have had no participation in destroying the estate, the privilege of taking emblements is reserved. Where, therefore, tenant for years upon condition, under-leases the lands, and the under-lessee sows corn, and then the tenant for years breaks the condition, by means of which the under-tenant is ousted, he may nevertheless enter and cut the corn. (a)

The under-tenants shall not be prejudiced.

Lastly, the right to take emblements can never exist where the tenancy is for a certain definite period, determinable only by effluxion of time; for if in such case the tenant with his eyes open, sow corn which cannot become ripe until after the expiration of his estate, the law will afford him no relief. (b)

Emblements cannot be taken where the tenancy is for term certain,

But though, in the case of a term of years, the law excludes the lessee from the right to take the profits accruing after the expiration of such term, such right may be, and frequently is, reserved to the lessee by an express covenant in the lease. Where, therefore, the lessor covenants that the lessee for years shall have the emblements after the end of the term, the corn, &c., growing at the expiration is well transferred to the lessee, who may afterwards enter and cut it. (c) So, by the custom of the country, tenant for years in

unless under a special agreement,

or by custom.

(y) *Ibid.* *Knevett v. Pool*, Cro. 111. *See vide contra*, 5 Co. 556. Eliz. 463.

(b) Co. Lit. 55. *Davies v. Con-*

(z) Doe dem. *Upton v. Wither-* nop, 1 Price, 53. wick, 3 Bing. 11.

(c) *Grantham v. Hawley*, Hob.

(a) *Oland v. Burdwick*, Cro. Eliz. 132. 460. Rol. Abr. 727. 2 Bl. Com.

particular districts will be allowed to re-enter and cut the corn which he has sown. (*d*)

Such agreement retains the interest in the land in the lessee.

The effect of such a covenant is not merely to give the ex-lessee a right to re-enter for the purpose of cutting the corn, but absolutely continues the term as to the land upon which the corn grows; so that, though the tenant may have quitted the rest of the premises, he is considered as remaining in possession of such corn-land. (*e*)

Outgoing and incoming tenants.

As between outgoing and incoming tenants, there are certain mutual privileges founded on custom or usage of the country or on express agreement. The outgoing tenant has the privilege of retaining possession of the land on which his away growing crops are sown, with the use of the barns and stables for housing and carrying them away. On the other hand, the incoming tenant has the privilege of entering during the continuance of the old tenancy, for the purpose of ploughing and sowing the land. (*f*) A common usage in the neighbourhood is sufficient to confer the right without proof of an immemorial legal custom, and may be insisted on, provided the custom be not expressly excluded by the agreement or lease under which the land is held. (*g*) But the custom can have no avail against an express provision in respect of the away going crop; as where the outgoing lessee has provided by a *covenant* with the lessor for the removal of the crops, the incoming tenant cannot insist upon the custom of the place, in order to compel the old lessee to leave a certain quantity of standing corn; for the custom of the country is of no avail against an express covenant; and under the covenant with the lessor the property in the crops is vested in the old

(*d*) *Boraston v. Green*, 16 East, 71. *Caldecott and another v. Smythes*, 7 C. & P. 808.

(*e*) *Ibid*

(*f*) *Boraston v. Green*, 16 East, 71. *Wigglesworth v. Dallison*,

Dougl. 201. *Beavan v. Delahay*, 1 H. Bl. 5.

(*g*) *Senior v. Armitage*, Holt's N. P. C. 197. *Webb v. Plummer*, 2 B. & Ad. 746.

lessee: nor can his being guilty of a breach of any covenant on his part, in respect of the crops, alter the property. (g)

If the lease contain no stipulation in respect of quitting, the outgoing tenant will be entitled to his away growing crop although the holding should not have been in accordance with the custom; (h) but if the custom is that where there is a regular Lady-day tenancy, and if it is determined in a regular way, the tenant shall be entitled to the way-going crops, he will not be so entitled in case the tenancy is determined subsequently to Lady-day, under an agreement which is silent as to way-going crops, although the tenancy commenced at Lady-day. (i)

If the tenant holds over after the determination of a lease, which contained a special provision as to quitting, and without coming to any fresh agreement with his landlord; he will be considered as holding on the same terms as before, and consequently to be excluded from the custom, although holding as tenant from year to year. (j)

Generally speaking, the outgoing tenant has no claim to compensation for manure or dung left on the premises, but the agreement may be to the contrary, and where the outgoing tenant had covenanted with his landlord to leave the manure made by him on the farm, and sell it to the incoming tenant at a valuation, to be made by certain persons; the Court of King's Bench held that the effect of such covenant was to give the outgoing tenant a right of on-stand for his manure upon the farm; and that the possession of, and property in it, remaining in him, he might maintain trespass against the incoming tenant who had removed and used it before such valuation. (k)

(g) *Boraston v. Green*, *sup.* 214. 1 Ad. & Ell. 926.

(h) *Holding v. Piggott*, 7 Bing. 465. 5 Moore & Payne, 427.

(j) *Boraston v. Green*, *supra*.

(k) *Beaty v. Gibbons*, 16 East,

(i) *Thorpe v. Eyre*, 3 Nev. & M. 116.

Custom
to provide
tillage, &c.

A custom for the tenant of a farm in a particular district to provide labour, tillage, sowing, and all materials for the same in his away going year, and for the landlord to make him a reasonable compensation, is valid in law ; (l) and may be insisted upon, although the farm be held under a written agreement, provided the custom be not thereby expressly excluded. (m)

To remove
straw, &c.

The right to remove straw and hay is generally regulated by the custom. In a case in which the outgoing tenant was bound by his covenant to bring back dung for all the hay sold by him, to be carried off the premises at the time of his quitting, sold a rick then standing to a purchaser, but without mentioning his liability to bring back manure ; it was held, that the incoming tenant had a right to refuse the hay to be removed until the manure should be deposited according to agreement. (n)

A tenant may, by his own act, lose the right to be paid for tillage and improvements, notwithstanding an agreement to that effect, as if he leave the premises, although with the consent of the landlord, before the expiration of his tenancy, but without any fresh agreement. (o)

An usage for the landlord to pay a sum in compensation to the off-going tenant, for labour and expense bestowed by him in tilling, fallowing, and manuring arable and meadow land, according to the course of good husbandry, the advantage of which labour the tenant could not otherwise reap, is a reasonable usage. (p)

Odd mash.

If the custom be for the outgoing tenant (for what is called

(l) *Dalby v. Hirst*, 3 Moore, 536. 753.
1 B. & B. 225.

(m) *Senior v. Armitage*, Holt's
N. P. 197.

(n) *Smith v. Chance*, 2 B. & A.

(o) *Whittaker v. Barker*, 1 Cro.
& Mee. 113.

(p) *Dalby v. Hirst*, *supra*.

his odd mash) to crop one-third of the arable and wheat, and reap that wheat after his tenancy has expired, and he crop more than one-third, the landlord will be entitled to all that which is last sown, or above one-third, unless it is shewn that the tenant has a lien on it for the sowing and the seed. (*q*) But a parol permission by the landlord to crop beyond one-third or odd mash, will be binding both on the landlord and incoming tenant. (*r*)

Where the outgoing and incoming tenants agree for the sale and purchase of the crops, &c., the landlord's rights will not, of course, be thereby affected. (*s*)

Landlord not affected by agreement between outgoing and incoming tenants.

(*q*) *Caldecott and another v.* 810.

Smythes, 7 C. & P. 80.

(*s*) *Vide Petrie v. Daniel*, 1 Smith,

(*r*) *Griffith v. Tombs*, 7 C. & P. 199.

BOOK THE FOURTH.

CHAPTER THE FIRST.

*Of the Landlord's Proceedings against his Tenant,
and the Tenant's Defence thereto.*

SECTION I.

OF A DISTRESS FOR RENT.

BEFORE considering this subject it may be proper to advert to some recent decisions on the statutes of the 3 & 4 Wm. IV. c. 27, and 3 & 4 Wm. IV. c. 42.]

3 & 4 Wm. 4,
c. 27.

The first of these statutes was passed for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto. By sec. 42, it was enacted, that from and after the 31st of December, 1833, no *arrears of rent* or of interest, in respect of any sum of money, charged upon or payable out of any land or rent, or in respect of any legacy or any damages in respect of such arrears of rent or interest should be recovered by *distress*, action, or suit but within *six* years next after the same should have become due, or next after an acknowledgment of the same in writing should have been given by the person by whom the same was payable, or his agent.

3 & 4 Wm. 4,
c. 42.

In the same session of parliament an act, c. 42, was passed for the further amendment of the law and the better advance-

ment of justice, and by sec. 3 it was enacted, that all actions of debt for rent upon an indenture of demise, all actions of covenant upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance should be brought within *ten* years after the end of the then present session, or within *twenty* years after the cause of such action or suits, but not after.

After the passing of these acts a case occurred, (a) in which an action was brought to recover *twenty* years' rent upon an indenture of lease. In answer to the action, the statute of the 3 & 4 Wm. IV. c. 27, was pleaded as to part, and an assignment of the reversion as to the rest. The action had been commenced on the 22nd of July, 1833, and the statute received the royal assent on the 24th of July, 1833, being two days after. *Paddon v. Bartlett.*

In answer to the plea of the statute it was contended that the case was not within it, the statute not being retrospective, and in this view of the case the Court concurred. It was also contended that the act did not apply to actions for rent *on specialty*, and if it did, it was repealed by the 3 & 4 Wm. IV. c. 42. But on this point the opinion of the Court was not required.

In a subsequent case, (b) an action of covenant was brought for rent, being ten years and a half in arrear, and the defendant pleaded, as to part, that it did not become due within six years, nor had any acknowledgment been given, to which the plaintiff demurred. In support of the demurrer it was contended, as in the former case, that the statute of the 3 & 4 Wm. IV. c. 27, did not apply to rent reserved *on a deed*, or if it did, it was repealed by the subsequent statute, and that sec. 42 of the 3 & 4 Wm. IV. c. 27, applied only to rent on simple contract, or to claims for use and occupation. On *Paget v. Foley.*

(a) *Paddon v. Bartlett*, and another, 4 Nev. & M. 40. 5 Nev. & M. 833.

(b) *Paget v. Foley*, 2 Bing. 679. N. S.

the other hand, it was argued that by the 3 & 4 Wm. IV. c. 27, the plaintiff's were precluded from recovering any arrears of rent unless within six years after the same became due, and that the statute of the 3 & 4 Wm. IV. c. 42, was not incompatible with, and did not repeal the former act. The judges of the Court of Common Pleas appear to have been unanimous in opinion that the action of covenant might be maintained within the limits of the 3 & 4 Wm. IV. c. 42, the language of which was express and precise. But they apparently differed as to the operation of the 3 & 4 Wm. IV. c. 27, the Chief Justice entertaining a strong opinion that sec. 42 of the statute applied to rent charges, and not to rents reserved on leases, in which, however, *Bosanquet, J.*, did not seem to concur, nor did he think the statute could have been confined to leases by parol, supposing the subsequent statute not to have passed.

According, therefore, to the view taken by the Chief Justice, sec. 42 of the 3 & 4 Wm. IV. c. 27, does not apply to rents reserved on lease, and must be confined to rent charges; but if the construction put on the statutes by Mr. Justice *Bosanquet* be right, then, although the 3 & 4 Wm. IV. c. 27, is in part repealed by the 3 & 4 Wm. IV. c. 42, yet as the latter does not extend to the remedy by *distress*, it will follow that notwithstanding the lessee may have his action for rent in arrear to the extent of the 3 & 4 Wm. IV. c. 42, yet as to his remedy by distress he is confined to the six years prescribed by the 3 & 4 Wm. IV. c. 27. So far as the writer may hazard an opinion, the construction put on the statutes by the C. J., is the most free from difficulties.

Distress
defined.

A distress is the taking of a personal chattel out of the possession of the wrong-doer, into the custody of the party injured, to procure a satisfaction for the wrong committed. (c)

The thing taken, as well as the process, is in our law books frequently called by the same name of a distress.

(c) 3 Bl. Com. 6.

The general nature of rents has been already discussed ; (d) and it may, therefore be necessary merely to remind the reader, that a distress was at common law incident to rent *service* only, and could not be taken for a rent *charge*, unless a special provision to that effect was inserted in the grant; but that this distinction is now abolished by the statute 4 Geo. II. c. 28, which gives the remedy by distress for all kinds of rents issuing out of real property. Out of a mere personal chattel, indeed, a rent cannot issue : but the landlord's remedy by distress will not be defeated by the demise being of lands and goods jointly ; and, therefore, where this point was raised in the case of *furnished lodgings*, the Court of Common Pleas decided, that a distress might be taken for the rent of these, because the whole rent issued out of the real part of the demise. (e)

By the common law, the general rule was, that rent being incident to the reversion, a distress could be taken by him only who had the reversion. And, therefore, it is laid down that for a rent reserved upon a gift in tail, or a lease for years or at will, the grantor or lessor shall distrain of common right, though no distress be spoken of : but in case a man make a feoffment in fee, reserving a rent, he shall not distrain for that rent, unless a distress be specially reserved. And so where a gift in tail, or a lease for life, was made with remainder over to a stranger in fee, reserving a rent to the feoffor, he could not distrain. Since the statute of *quia emptores*, a rent-service cannot be reserved on a grant in fee, although it may be supported as a rent-charge. Prior to the statute of the 4 Geo. II., a distress for such a rent could not be had, it not being incident to the reversion ; but as by that statute, distress is given for any species of rent, (f) the feoffor, upon such a reservation, will have a right to distrain as for a rent-charge. (g)

By whom may
be taken.

(d) *Vide supra.*

(e) *Newman v. Anderton*, 2 N. R. 224. And see *Baynes v. Smith*, 1 Esp. N. P. 206.

(f) *Vide* Hargrave's note, Co. Lit. 144. a.

(g) *Bradbury v. Wright*, Dougl. 624.

As at the common law it was not every reservation, though nominally of rent, which constituted a rent properly so called; so now no reservation, which would not at least have amounted to a rent seck at the common law, will support a distress under the statute 4 Geo. II., and as it seems to have been a rule of the common law, that a rent could not issue out of a mere chattel, (*h*) it has been determined on this principle, that even since the statute, if a lessee for years assign over his whole term reserving a rent without a special clause of distress, he cannot distrain for a rent so reserved; but his only remedy is upon the contract existing between him and the assignee. (*i*)

Where A., the lessee of two farms, agreed with B. that B. should have them during the leases; B. to remain tenant to A. during that period, and at the leaving the farms, B. to be paid for the fallows and dung; B. entered and paid one year's rent to A., who afterwards distrained for rent subsequently due: the Court of Common Pleas decided that the agreement amounted to an assignment, and that A. could not distrain. (*k*) And even though the instrument by which the lessee demises, do not amount to an assignment, still if he part with his whole interest, he will not be entitled to distrain. (*l*)

And where a termor underlets, so as to reserve a reversion to himself, yet when his own term is expired, his remedy by distress against his undertenant is gone. As where the plaintiff was weekly tenant under one Hughes, Hughes being lessee of the duke of Bedford, and after the expiration of Hughes's term he continued to claim rent, which the

(*h*) Butt's case, 7 Rep. 101. Lord Mountjoy's case, 5 Rep. 4. Earl of Stafford, *v.* Buckley, 2 Ves. 170. Turner *v.* Turner, 1 Bro. Ch. Rep. 316.

(*i*) Bro. Abr. *Dette*, pl. 39. *Vide supra*, p. 73, *et vide* Poultney *v.* Holmes, Str. 405. ——— *v.* Cooper, 2 Wils. 375. And see Smith

v. Mapleback, 1 T. R. 441, and Hoby *v.* Roebuck, 7 Taunt. 157. Talentine *v.* Denton, Cro. Jac. 111.

(*k*) Parmenter *v.* Webber, 8 Taunt. 593.

(*l*) Preece *v.* Corrie, 5 Bing. 25, and see Palmer *v.* Edwards, 1 Doug. 187.

plaintiff paid, under a protest that Hughes had no right to it, but that he paid it to avoid a distress; which distress at length being made, the plaintiff brought trespass against the bailiff of Hughes; the Court of Common Pleas thought that the action would lie, because no rent was due to the defendant either by privity of contract or privity of estate. (m)

And where a lease came into the hands of the original lessor, by an agreement entered into between him and the assignee of the original lessee, "that the lessor should have the premises as mentioned in the lease, and should pay a particular sum, over and above the rent, *annually*, towards the good will already paid by such assignee," the Court of King's Bench thought that such sum was reserved in gross, and not as rent, and consequently could not be distrained for: but that the assignee's remedy was by assumpsit for the sum reserved for the good will.

In order to sustain the right of distress, as between the landlord and tenant, the relation must actually be completed; a distress cannot be taken where the party is in possession in contemplation only of a tenancy. As where H. had entered upon certain premises under an agreement "that R. would by indenture demise to H. the house then in his occupation for the term of fourteen years from the 25th of December last past, at the yearly rent of 40*l.*, payable quarterly, clear of all taxes (except land tax); but if H. should pay to R. the sum of 40*l.* before the expiration of the first quarter, which should be at Lady-day next, the rent should be reduced to the rate of 33*l.* *per annum* payable quarterly," and R. distrained for three quarters of a year's rent, the Court of Common Pleas thought this was no demise; that H. could not be considered even as tenant from year to year; because, if at any time before the end of the first year a lease had been tendered to him, and he had refused to execute it, R. might have ejected him without notice to quit;

Relation of
tenancy must
be completed.

(m) Burne v. Richardson, 4 Taunt. 720.

and consequently they resolved that no distress could be taken as for rent arrear. (*m*) And this doctrine applies to all those cases, which have already been commented upon, where it is doubtful whether an instrument amounts to a mere agreement for a lease, or to an absolute demise, and no rent paid.

Slight circumstances will, however, constitute a tenancy, as the admission by a party holding under an agreement of a charge of half-a-year's rent in an account between him and his landlord. (*n*) And as soon as a party, holding under an agreement for a lease, pays rent, he becomes tenant from year to year, on the terms of the agreement, and the landlord may distrain. (*o*)

Where a lease was made *from* the 24th June, rendering rent, and the lessee entered upon the 24th, and, upon a distress being made, it was contended that the lessee having no right to enter until the 25th, was by his entry on the 24th, not a tenant, but a disseisor; the Court held that whether his entry was tortious or not, it could not discharge the contract for the payment of rent. (*p*)

Rent must be certain.

To entitle the landlord to distrain, the rent must be certain, and not subject to conditional deductions, as for new erections, or buildings, or the like. (*q*)

But, however, where A. entered a farm under an oral agreement for a lease for ten years, which was never executed, and though the time for paying the rent was settled by the agreement, it did not appear by it what was the amount to be paid; but he occupied according to the terms of the proposed lease, and *paid a certain rent* for two years, it was held that the lessor might distrain. (*r*)

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| (<i>m</i>) Hegan v. Johnson, 2 Taunt. 148. | v. Smith, 1 Man. & Ryl. 137. |
| (<i>n</i>) Cox v. Bent, 5 Bing. 182. | (<i>p</i>) Macdonel v. Waldon, Str. 550. S. C. 8 Mod. 54. |
| 2 Moore & P. 281. | (<i>q</i>) Reynard v. Porter, 7 Bing. 451. |
| (<i>o</i>) Mann v. Lovejoy, 1 Ryan & M. 355. | (<i>r</i>) Knight v. Benet, 3 Bing. 361. |
| Doe dem. Westmoreland | |

Tenant from year to year, underletting from year to year, has a reversion sufficient to entitle him to distrain. (s) Tenant from year to year underletting.

The relation of landlord and tenant being once established, the right to distrain, as incident thereto, can only be taken away by that which amounts to a dissolution of the tenancy: the lessor himself, therefore, whatever be the nature or quantity of interest that he possesses, or any person standing in the place of the lessor, whether as devisee, or heir, or personal representative, whether by express grant or limitation, or by operation of law, may distrain; though some modifications in the exercise of this right, resulting from the nature of the landlord's interest, are to be observed.

The landlord cannot distrain if he has treated the tenant as a trespasser, although the tenant remain in possession to the day of the distress; (t) or as it seems after notice to quit, without some evidence of a renewal of the tenancy. (u) Landlord cannot distrain if treating tenant as trespasser.

Joint-tenants are seised *per mie et per tout*, and, therefore, as every joint-tenant has an estate in every part of the rent, he may *distrain alone* for the whole, although he must afterwards *avow jointly* with his companions, or make cognizance as their bailiff, and account to them for their respective shares: and it is immaterial whether he make the distress by his own hand, or the hand of another, and, therefore, he may appoint a bailiff to distrain for the whole rent (v) without the assent of his fellows. (w) So the survivor may distrain for the arrears accrued in the lifetime of the deceased joint-tenant. (x) By joint-tenants.

Coparceners, before partition, are considered in law but as one heir, (y) and, therefore, must join in making a dis- By coparceners.

(s) *Curtis v. Wheeler*, 1 Moo. & Mal. 493.

(t) *Bridges v. Smyth*, 2 Moore & Payne, 740. 5 Bing. 410.

(u) *Jenner v. Clegg*, 1 Moo. & Rob. 213.

(v) *Pullen v. Palmer*, 3 Salk. 207.

(w) *Leigh v. Shepherd*, 2 B. & B. 465. *Robinson v. Hofman*, 4 Bing. 562.

(x) 2 Rol. Abr. 86.

(y) Co. Lit. 163. b.

tress; (x) but after partition they may make several distresses. (a) The same rule governs co-heirs in gavelkind, who are parceners by custom; (b) one, however, may distrain for rent due to him and his companions, without an actual authority from them, and avow in his own right, and make cognizance as their bailiff. (c)

By tenants in common.

But tenants in common, not holding by one title, and possessing several estates, and, therefore, not joining in real actions, or such mixed actions as chiefly arise out of the realty, (d) although they may join in an action for rent, (e) yet if they distrain they must make several distresses, and avow separately. (f) And where one holding under two tenants in common paid the whole rent to one of them, after notice from the other not to do so, it was held, that he who gave the notice might distrain for his share of the rent. (g) But it seems that upon a lease by tenants in common, the survivor may distrain for the whole rent, although the reversion be to the lessors, according to their respective interests. (h) And one tenant in common may lease his share to another, rendering rent, for which he may distrain, as if he had demised to a stranger. (i)

By husband and wife.

With regard to lands of a married woman, in no case whatever can she distrain alone, and the Courts have considered the rent to be so much in the nature of a personal chattel, belonging to the husband, that he may in all cases distrain, and even avow alone, for rent accruing during the coverture. (k)

32 Hen. VIII. c. 57.

By sec. 3, of the statute 32 Hen. VIII. c. 37, it is pro-

(s) *Stedman v. Page*, 1 Salk. 390. *Gilb. Distress*, 161.

(a) *Co. Lit.* 174. *b.* 195. *b.*

(b) *Lit. ss.* 241, 265.

(c) *Leigh v. Shepherd*, 2 B. & B. 465.

(d) *Lit. Sec.* 315. *Co. Lit.* 195. *b.*

(e) *Midgley v. Lovelace*, *Carth.* 289.

(f) *Lit. Sec.* 317. *Whitley v. Roberts*, 1 M'Clel. & Younge, 107.

Pullen v. Palmer, 3 Salk. 207.

(g) *Harrison v. Barnby*, 5 T.R. 246.

(h) *Wallace v. M'Laren*, 1 Man. & Ryl. 516.

(i) *Snelgar v. Henston*, *Cro. Jac.* 611.

(k) *North v. Wyard*, 2 Bulstr. 233. *Bowles v. Poore*, *Cro. Jac.* 282. *Wise v. Bellent*, *ibid.* 442.

Pullen v. Palmer, 3 Salk. 207.

vided, "That if any man have, in right of his wife, any estate in fee-simple, fee-tail, or for term of life, in any rents or fee-farms, and the same be unpaid in the wife's life, then the husband, after *the death of his wife*, or his executors and administrators, may have an action of debt against the tenant in demesne, or his executors or administrators, and also that the husband, after the death of the wife, may distrain for the said arrearages, in like manner as he might have done if his wife had been living."

The effect of this statute is to give to the husband the remedy of an action of debt, or a distress, for the arrears accrued before coverture, (*l*) for which he had before no remedy at all, after the death of the wife; except in his character of her personal representative, in which he might have sued for them in an action of debt, (*m*) and the statute also gives him the additional remedy of a distress, for the arrears accrued *during* the coverture, for which, at the common law, he could have had only an action of debt. (*n*) It will be observed, that the remedy of distress given by this statute is confined to the husband alone, the action of debt for the rent extended to his executors and administrators.

Tenant *pur autre vie*, is authorized by the fourth section of the statute of the 32 Hen. VIII. c. 37, to distrain for rent in arrear at the death of the *cestui que vie*, as he might at common law have distrained for rent during his life. Tenant *pur autre vie*.

Tenant by *elegit*, who comes in by act of law, and, in contemplation of law has only a chattel interest, is yet considered to have so far an estate in the rent of land, taken in execution, as enables him to distrain; although, from the nature of his estate, he can have only an uncertain interest in the reversion. (*o*) But tenant by *elegit* is not within the 32 Hen. VIII. c. 37, and, therefore, where tenant for life of a Tenant by *elegit*.

(*l*) Co. Lit. 162. *b*.

nel's case, 4 Rep. 51.

(*m*) Sharp *v.* Poole, Bendl. 457.(*o*) Bro. Distr. pl. 72.(*n*) Co. Lit. 162. *b*. 351. *b*. Og-

rent charge confessed a judgment, which was extended by *elegit*, and the conusee distrained, and in replevin avowed for the arrears incurred in the lifetime of the tenant for life, the distress was holden to be bad. (*p*)

By conusee
of a statute.

The conusee of a statute merchant, or statute-staple, has also such an interest in the lands as enables him to distrain: for an entry under an execution by statute, creates in the conusee a *quasi* freehold in the land, and turns the estate into a reversion; (*q*) so that after entry the conusee is capable of taking a release of the reversion itself, or of surrendering to the reversioner. (*r*)

By mortgagee.

To enable the mortgagee to distrain on the mortgagor in possession, an agreement to that effect should be inserted in the mortgage deed, and a sum certain be stated by way of rent. A mortgagee, where the premises are leased before the mortgage, after giving notice of the mortgage to the tenant in possession, is entitled as grantee of the reversion to distrain for rent in arrear *at the time of the notice*, as well as for that which accrues afterwards, and to take his other remedies as assignee of the reversion, though he has never turned his title into actual possession; for the attornment of the tenant is rendered unnecessary by the statute 4 Ann. c. 16, s. 9; and the notice to the tenant operates as an attornment at common law, having relation back to the time of the grant. (*s*)

Where a lease is made by the mortgagor *after* the date of the mortgage, the mortgagee cannot distrain on the tenant, or sue him for the rent, until he has accepted rent from the tenant, (*t*) or given the tenant notice to pay him the rent, and the tenant has acquiesced; (*u*) and it seems that as between

(*p*) *Pool v. Neel*, 2 Sid. 29. *Pool v. Duncomb*, Bull. N. P. 56.

(*q*) *Dighton v. Greenvil*, 2 Vent. 327. *Corbet's case*, 4 Rep. 82. Vin. Ab. Vol. 9, p. 125.

(*r*) Co. Lit. 270. *b*.

(*s*) *Moss v. Gallimore*, Doug. 279.

Rogers v. Humphreys, 4 Ad. & Ell. 299.

(*t*) *Rogers v. Humphreys*, *supra*.

(*u*) *Doe v. Boulton*, 6 Ad. & Ell. 675. *Partington v. Woodcock*, *ibid*. 680.

the mortgagee and the tenant, a new tenancy will be then created from year to year, on the terms of the lease. The rents due at the time of the notice on a demise subsequent to the mortgage, cannot be recovered by the mortgagee *quod* rents, but if the tenant refuse to pay, the mortgagee may evict him and recover the rent in arrear, in the form of mesne profits, although if the tenant pay to the mortgagee the rent in arrear he will be justified. (*s*)

Guardians may grant leases, and may distrain in their own names. (*t*)

A receiver of rents appointed by the Court of Chancery, and his bailiff may distrain without a particular order of the Court. (*u*) If, however, there is a doubt in whom the legal right exists, he should obtain such order, as he must distrain in the name of the person having the legal right; (*v*) but if the receiver is the actual lessor, the tenant cannot deny his right to distrain, although the fact appears on the lease of his being a receiver only, and the rent is reserved to him in that character. (*w*)

Bailiff distraining, need not be a sworn bailiff under 13 Edward I. c. 37, the bailiffs mentioned in that chapter not being bailiffs employed in making distresses for arrears of rent; but by lords of Courts for compelling parties to follow the county, hundred, wapentake, and such like Courts. (*x*)

A bailiff need not have a written authority to enable him to distrain, (*y*) except in the case of a corporation aggregate not having a superior. (*z*)

(*s*) *Pope v. Biggs*, 9 B. & C. 421.

34. 4 Bing. 2.

(*t*) *Shopland v. Rydler*, Cro. Jac. 55, 98. *Bredell v. Constable*, Vaugh. 179. *Bennett v. Robins*, 5 C. & P. 379.

(*x*) *Begbie v. Haynes*, 2 Bing. 124. *N. S. Child v. Chamberlain*, 6 C. & P. 213.

(*y*) *Cary v. Matthews*, Salk. 191.

Manby v. Long, 3 Leo. 107.

(*u*) *Pitt v. Snowden*, 3 Atk. 750
(*v*) *Hughes v. Hughes*, 3 B., C. & C. 87. *Pitt v. Snowden*, *supra*.

(*z*) *Randal v. Dean*, 2 Lutw. 1496. Vin. Ab. Vol. 3, p. 538.

(*w*) *Dancer v. Hastings*, 12 Moore,

The subsequent recognition by the landlord of the act of his bailiff, will be as good an authority as if he had previously appointed him. (*x*)

An authority given in writing to the tenant to pay the rents to a third person, will not authorize such party to distrain for rent arrear. (*y*)

Distress by
executors
under statute
32 Hen. VIII.
c. 37.

At common law, where a man was seised of a rent-service, rent-charge, rent-seck, or fee-farm rent, either in fee, or in tail, and died, neither his heir nor personal representative could recover from the tenant the arrears of rent which had become due in the testator's lifetime. (*z*) The same defect applied to the case of tenant *pur autre vie* of a rent, who died living *cestui que vie*: and where a man was seised of such a rent for his own life and died, though his executors or administrators might have had an action of debt for the arrears at common law, yet they had no power to distrain. (*a*) To remedy which defects it was enacted, by the 32 Hen. VIII. c. 37, entitled "an act for recovery of arrearages of rent by executors of tenant in fee-simple," that the executors and administrators of tenants in fee-simple, tenants in fee tail, and tenants for term of lives, of rent-service, rent-charges, rent-secks, and fee-farms unto whom any rents-service, rent-charges, rent-secks, or fee-farms shall be due and unpaid at the time of death of such tenants, may have an action of debt against the under-tenants, or their executors and administrators for the same; and *may also distrain* for such arrears of rent, becoming due in the lifetime of such tenants, upon the lands, tenements, and hereditaments, chargeable to the distress of the testator, so long as such lands, &c., shall remain in the seisin or possession of the said under-tenants by whom the rent ought to have been paid, or in the seisin or possession of *any other person claiming the said lands, &c., by and from the under-*

(*x*) *Trevillian v. Pine*, 11 Mod. 112. 9 Bing. 608. 2 M. & Sc. 756.

(*z*) *Co. Lit.* 162. *a*.

(*y*) *Ward v. Shew and another*,

(*a*) *Ibid.*

tenants, by purchase, gift, or descent, in like manner as the testator might have done in his lifetime."

Upon this statute arose several points of considerable nicety.

First, the statute, by its very terms, is confined to the personal representatives of such persons as are *seised of a rent in freehold*, (b) *viz.*, in fee, in tail, or for life. In the case of *Turner v. Lee* it was said, that the statute only applied where the common law gave no remedy, and consequently that the executors of tenant for his own life (who might have maintained debt for the arrears) had no power of distress under this statute; (c) and in another case it was supposed that Lord Coke himself had laid down the same doctrine. (d) But it seems to have been successfully proved by Mr. *Hargrave*, that Lord Coke was there misunderstood by the Court: (e) and we may conclude "that the statute is a remedial law, and extends to the executors of all tenants for life." (f) But to the executors of tenant for years of a rent charge, the statute does not extend, however long may be the term for which the rent is granted, and though it be for years determinable with the life of the grantee, it being clear that the grantee is not seised of a rent in freehold. (g)

The statute extends to executors of persons seised of a rent in freehold only,

and not to executors of tenant for years of a rent charge.

In a recent case, the Court of King's Bench approved of the case of *Hoole v. Bell*, and held it must be considered, that the statute of the 32 Hen. VIII. c. 37, is not confined to persons who had no remedy previously. (h)

2. If a man make a lease for life or lives, or a gift in tail reserving rent, this is a rent-service within the statute. (i)

(b) Cro. Car. 471.

(c) *Turner v. Lee*, Cro. Car. 471.

(d) *Hoole v. Bell*, Lord Raym.

572. S. C. (*Howell v. Bell*), 3 Salk. 136.

(e) Co. Lit. 162. a. n. (4.) 162. b. n. (1).

(f) *Per curiam* in *Hoole v. Bell*,

ub. sup.

(g) *Turner v. Lee*, Cro. Car. 471.

(h) *Prescott v. Boucher*, 3 B. & Ad. 859.

(i) Co. Lit. 162. b.

To cases in which the testator might have distrained.

3. The statute only applies to cases in which the owner of the rent, if he had lived, might have distrained; and therefore, if the rent be in arrear, and the lord grant away his interest and die, his representatives have no remedy for the arrears. (*k*)

To every thing payable as rent;

4. The statute extends to all rents in freehold, whether of money, or corn, and the like; or whether annual, or payable every two, three, or four years:—but corporal services are not within the statute. (*l*)

but not to copyhold lands.

5. Rents issuing out of *freehold* lands are alone within the statute; consequently it does not extend to rents issuing out of copyhold lands. (*m*)

And the statute only gives power to distrain where the land remains in the possession of the lessee, &c. or some person claiming under him.

The statute gives the power of distress upon the lands out of which the rent is reserved, so long as they continue in the hands of him from whom the rent is due, or of any person representing or claiming title through, or under him, by purchase, gift, or descent *in infinitum*. (*n*) But they cannot be distrained upon for such rent, if they be in the hands of one claiming paramount to him; and, therefore, if the lord enter upon the grantor for an escheat, the land shall not be distrained upon for arrears of the rent. (*o*) So where a man makes a lease for life rendering rent, remainder for life, remainder to a stranger in fee, and after the accruing of rent from the first tenant for life the lord dies, and then the tenant for life dies, the executors cannot distrain upon the reversioner, because he claims paramount the first tenant for life. (*p*) And if tenant in tail grant a rent for life, and die, the executor of the grantee cannot distrain for the arrears incurred in his testator's lifetime upon the issue in tail, who comes in under the original gift in tail, and not under

(*k*) *Ibid.* Ognel's case, 4 Rep. 50. *b.* ridge's case, 5 Rep. 118.

(*o*) Co. Lit. 162. *b.*

(*l*) Co. Lit. 162. *b.*

(*p*) *Ibid.* Ognel's case, *ub. sup.*

(*m*) Appleton v. Doily, Yelv. 135. 51.

(*n*) Ognel's case, *supra.* Ed.

the grantee of the rent. (*q*) And so of tenant in dower, and tenant by the curtesy, who come in not by the act of the party only, but by act of law. (*r*)

Whether the statute extended to the executors of tenants in fee for rent in arrear on a chattel lease, has been a matter of much discussion, but which is now settled. In a case in which A. seised in fee, leased to the plaintiff for twenty-one years, and, afterwards dying, seised of the reversion, the defendant administered, and distrained for half a-year's rent due to the intestate, for which he avowed. And on demurrer to the avowry, it was objected that there was not any privity of estate between the administrator and the lessor; and, therefore the avowry, which is in the realty, could not be maintained by him. And it was observed, that this was a case out of the statute 32 Hen. VIII. c. 37, for that only gives a remedy by way of distress for rents of freehold; in which opinion the Court seemed to concur. (*s*) In *Powell v. Killick* on the other hand, where in trespass for entering plaintiff's house and carrying away his goods, it appeared that the defendant was the executor of A. who, being seised in fee of a house, was the plaintiff's landlord, and that defendant distrained for rent due to the testator at the time of his death; it was objected for the plaintiff that the statute extended to the representatives of such persons only to whom rent-services, rent-charges, rent-secks, or fee-farms were due; and that the present case did not fall within either of those descriptions. *Lee, C. J.*, overruled the objection, and said that, this was a rent-service, the testator being in his lifetime seised in fee, and the plaintiff holding upon a tenure which implied fealty. (*t*)

Executors of
tenant in fee.

This was, however, only a *Nisi Prius* decision, but it was approved of by Mr. Justice *Burrough*, in *Meriton v. Gilbee*, (*u*)

(*q*) *Lambert v. Austin*, Cro. Eliz. 332. *Lord Fairfax v. Lord Derby*, 2 Vern. 612.

(*r*) Anon. 1 Leon. 302. pl. 418.

(*s*) *Renvin v. Watkin*, M. 5 Geo.

II. cited Selw. 678.

(*t*) *Ibid.* Middlesex Sittings, M. 25 Geo. II.

(*u*) 8 Taunt. 159. 2 Moore, 48.

and by the Court of Common Pleas in *Martin v. Burton*, (u) and *Staniford v. Sinclair*, (v) but in neither of these three cases did the point call for a decision. In the case of *Prescott v. Boucher*, all the cases bearing on the point were reviewed by Lord *Tenterden*, and the Court came to the conclusion, that the executors of tenant in fee were not entitled to distrain for rent in arrear in the lessor's lifetime on a lease for years. (w)

The inconvenience which might result from this decision, has been now obviated by the statute of the 3 & 4 Wm. IV. c. 42, by which it is enacted, that it shall be lawful for the executor or administrator of *any* lessor or landlord, to distrain upon the lands demised for any term or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime. And that such arrearages may be distrained for after the end or determination of such term or lease at will in the manner as if such term or lease had not been ended or determined, provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrearages became due. Provided also, that all the powers and provisions in the several statutes relating to distresses for rent, should be applicable to distresses so made as aforesaid.

Distress by
executors of
tenants for
years.

Where a lessee for a term of years underlets the land and dies, his personal representative may, without the aid of any statute, distrain for the arrears of rent which have become due in the lifetime of the deceased; because he not only represents the testator, but has the reversion and rent annexed to it, in the same manner as the deceased himself had. (x) And so for rent accruing due after the testator's death the

(u) 1 B. & B. 279, 3 Moore, 608, v. Jones, *ibid.* 967.

(v) 2 Bingh. 193.

(x) *Wade v. Marsha*, 1 Rol. Abr.

(w) 3 B. & Ad. 849, *et vide* Jones 672, l. 35.

executor or his representative *in infinitum*, may distrain, so long as the term continues in them. (a)

At common law, the lessor of lands could only distrain during the continuance of the lessee's estate. Where the term expired, the lessor's remedy by distress was gone; so that where a lease for a year was made commencing at Michaelmas reserving rent half-yearly, and at the subsequent Michaelmas rent was in arrear, the lessor could not distrain for it; for before Michaelmas the half-year's rent did not accrue, and by the arrival of Michaelmas when the rent did accrue, the term was ended. (b)

Distress may be taken six months after the term has expired, provided the tenant remain in possession.

To remedy this evil the statute 8 Anne, c. 14, ss. 6, 7, 8 Ann. c. 14. enacts, that all persons having rent in arrear or due upon any lease for life or lives, or for years, or at will, ended and determined, may distrain for such arrears, after the determination of such leases; provided that such distress be made within six calendar months after the determination of such lease, and during such landlord's title or interest, and *during the possession of the tenant* from whom such arrears became due. So that now, where the tenant remains in possession, the remedy by distress is kept alive, notwithstanding the termination of the lease; and it will have been observed, that a similar provision is inserted in the statute of the 3 & 4 Wm. IV. c. 42.

The statute of the 8 Anne contains a threefold proviso. First, the distress must be within six calendar months after the lease for life, years, or at will, is determined. (c) Secondly, the lessor's title or interest must continue. Thirdly, the possession of the tenant, from whom the rent became due, must be continuing.

With reference to the first branch of this proviso, it has

(a) *Ibid.* and S. C. Latch, 211.

(c) *Vide* Coupland v. Maynard,

(b) Co. Lit. 47. b. 1 Rol. Abr. 12 East, 134.

672. 1. 15.

been determined, that where the tenant left his way-going crops upon the premises more than six months after the expiration of the term, but within the time allowed by the custom of that particular country, they were distrainable; because, in fact, the contract between the parties, still continued by the force of the local custom; and, being so continued, it could only be continued upon the terms of the original lease, and consequently subject to all the landlord's rights. (*d*)

Or the representative of the tenant.

With reference to the third branch, though the words are confined to the possession *of the tenant*, yet where the lessee died before the term expired, and his administrator continued in possession during the remainder of it, and after the expiration and within six months thereof a distress was made for rent accruing due both before and after the death of the tenant, the Court over-ruled the objection that a distress could be, by the words of the statute, only during the possession of the tenant. (*e*)

This statute was made for the benefit of landlords, and is not confined to cases of a *tortious* holding over, (*f*) nor is it necessary that the tenant should remain in possession of the *whole* of the premises demised. (*g*)

Where a lease is made for a year, and so from year to year, and after the commencement of the second year the lessee dies, the term must be considered as continuing till the end of that year; and consequently the lessor may distrain upon the executor or administrator. (*h*)

Things in *custodiâ legis* cannot be distrained; as any thing

(*d*) *Beavan v. Delahay*, 1 H. Bl. 5. *Lewis v. Harris*, *ibid.* 7. n. (*a*). And see *Boraston v. Green*, 16 East, 71, and *Knight v. Benett*, 3 Bing. 364.

(*e*) *Braithwaite v. Cooksey*, 1 H. Bl. 465.

(*f*) *Nuttal v. Staunton*, 4 B. & C. 51.

(*g*) *Ibid.*

(*h*) *Legg v. Strudwicke*, 2 Salk. 414. *Belasyse v. Burbridge*, Lutw. 214. *Denn dem. Jackson v. Cartwright*, 4 East, 29.

distraint damage fasant, (*h*) or goods taken in execution. (*i*)
 In the case of a tenancy at will, where the estate of the tenant is determined either by his own death, or by the act of the lord, if the outgoing tenant sell the standing corn, and then rent be in arrear from the new tenant, it is not competent to the landlord to distrain the corn, which it would have been lawful for the tenant at will, or his executor, to have reaped. (*k*)

A distress cannot be taken of things in *custodiâ legis*,

As rent does not become due till the last moment of the day of reservation, (*l*) a distress for rent arrear cannot be taken till the day after, (*m*) unless some special agreement to that effect be made between the parties. (*n*) Where a lease stipulates that the rent shall be paid in advance, the landlord may distrain accordingly. (*o*)

nor till the rent become due.

Distress is, in ordinary cases, a demand; but if the lease contain a reservation of rent, payable quarterly or half-quarterly, if required, and the landlord receive the rent for some time quarterly, he cannot afterwards distrain for a half-quarter's rent without notice. (*p*)

Demand.

A distress for service or rent arrear cannot be made in the night, but must be taken in the day-time, after sun-rising and before sun-set. (*q*)

It must be taken in the day-time.

A distress for rent can only be made upon some part of the demised premises out of which the rent issues: (*r*) but upon any part of these it may be taken for the whole rent, even though the different parts lie in different counties,

And upon the demised premises;

(*h*) 1 Co. Lit. 47 *a*. Selw. N. P. 600.
 9 edit. p. 671.

(*i*) Lit. s. 68.

(*k*) Easton *v.* Southby, Willes, 131.

(*l*) Duppa *v.* Mayo, 1 Saund. 287.

(*m*) 21 Hen. VI. 40. Co. Lit. 47. *b*. l. 6. Dr. & Stud. Dial. 2. c. 9.

Duppa *v.* Mayo, 1 Saund. 282.

(*n*) Buckley *v.* Taylor, 2 T. R.

(*o*) Harrison *v.* Barry, 7 Price, 690.

(*p*) Mallans *v.* Arden, 10 Bing. 299. 3 M. & Scott, 793.

(*q*) Mirrour, c. 2. s. 16. Co. Lit. 142. *a*. Attenburgh *v.* Peaple, 6 C. & P. 212.

(*r*) 1 Rol. Abr. 671. l. 10.

because the whole rent issues out of every part of the land. (s)

But where an *advowson* is demised for life, rendering rent, and the rent is in arrear, a distress cannot be taken in the *glebe*. (t)

In a recent action of trover for two barges, which had been distrained for rent due in respect of a wharf, close to which they were lying in the River Thames, fastened by a rope to piles, which were constructed partly for the support of the wharf, and partly that barges might be attached to them, it was held by the Court of Common Pleas that the barges were liable to be distrained for rent due in respect of the wharf, they being as much on the premises demised as the nature of the thing would admit of. (u)

The same question was re-heard by the Court of King's Bench, in an action of trover for the two barges, and it was stated in a special verdict that by an indenture the defendant demised to the plaintiff a wharf "with all ways, paths, passages, profits, commodities, and appurtenances whatsoever, to the said wharf belonging:" and that by the indenture, the *exclusive use* of the land of the river opposite to, and in front of the wharf, between high and low water mark, was demised as appurtenant to the wharf, but that the *land itself* was not demised. The Court of King's Bench held, that the meaning of this finding was, either that the land was demised as appurtenant to another piece of land, *viz.*, to the wharf, which, in point of law, could not be; or that the use and enjoyment of the land passed as appurtenant, which would be a mere easement or privilege, out of which no rent could issue; and that, consequently, no distress could be made of barges lying on such land, in whichever way the finding

(s) 1 Rob. Abr. 671, l. 27.

(u) *Buszard v. Capel*, 4 Bing

(t) *Ibid.* l. 22, 24. 11 Hen. VI. 5. 137. S. C. 2 C. & P. 541.

of the jury was to be taken. (v) The case was afterwards carried into the Exchequer Chamber, and the judgment of the Court of King's Bench affirmed. (w)

Where a *joint* demise has been made to several tenants of several lands, a distress for the rent due from all may be taken in the lands of any one. (x) But if several parcels of land are let to the same parties under *separate* demises, and rent is due upon more than one, a *joint* distress cannot be taken. (y)

In general, the lord cannot take a distress but from the lands out of which the rent issues; nor by the statute of Marlbridge, 52 Hen. III. c. 15, can a distress for rent service be taken in the common road or king's highway; (z) so that if the lord go to distrain cattle, and they *escape* out of the lands demised, or into the highway within his view, he cannot pursue them; (a) neither can he, if they be driven off the lands in his sight for any *lawful* purpose: (b) but where they are driven off *in the view of the lord* for the express purpose

unless it be
driven off the
land in sight
of the lessor ;

(v) *Buszard v. Capel*, 8 B. & C. 141.

(w) 6 Bing. 150.

(x) 1 Rol. Abr. 671 l. 33.

(y) *Rogers v. Birkmire*, Str. 1040. S. C. Ca. temp. Hardw. 145.

(z) "*Nulli de cætero liceat ex quâcunque causâ distractiones facere extra feodum suum, nec in viâ regiâ, aut in communi stratâ nisi Domino Regi, et ministris suis specialem auctoritatem ad hoc habentibus.*"

Which, according to Sir Edward Coke, is but an affirmance of the common law, and is to be understood of distresses by reason of a *seignory*, and not of distresses for rent-charges. 2 Inst. 131. And that a rent-charge may be taken in the highway, see *Smith v. Shephard*, Cro. Eliz. 710. As to the

exception in favour of the crown the king may distrain for his rents and services out of his fee, upon any lands of his tenant, which the tenant has in his own occupation, and which are not in the possession of his lessee for life, years, or at will. 2 Inst. 132. Which royal privilege of distress *extra feodum* is further extended by the statute 22 Car. II. c. 6, to the purchasers of certain fee-farm rents belonging to the crown, whether issuing out of corporeal or incorporeal hereditaments. *Vide* the statute, and *Attorney-General v. Mayor, &c., of Coventry*, 2 Vern. 713.

(a) Co. Lit. 161. a. 2 Inst. 131.

(b) *Ibid.* 1 Rol. Abr. 671, l. 45.

of avoiding the distress, the lord may make fresh pursuit, and seize them in the highway, or in any other place off the lands demised. (b)

or fraudulently
and clandestinely removed.

11 G. II. c. 19.

But at common law, if *before* the lord had view of the cattle they were driven off the lands, even for the express purpose of avoiding the distress, the lord could not pursue or take them. (c) To remedy which defect in the law, it is enacted by the statute, 11 Geo. II. c. 19, s. 1, that where any tenant or lessee for life or lives, for years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is reserved or made payable, shall fraudulently or clandestinely convey away or carry off or from such premises, his goods or chattels, to prevent the landlord or lessor from distraining the same for arrears of rent so reserved, the landlord or lessor, or any person by him empowered, may within the space of thirty days next ensuing the removal of the goods, take and seize them as a distress *wherever they may be found*; provided, however, they have not, before such seizure, been sold *bonâ fide*, and for a valuable consideration.

To entitle the landlord to pursue the goods of the tenant under this statute, it was held by *Eyre*, C. J., that the removal must have taken place *after* the rent actually became due, and was in arrear. (d) And although, in a subsequent case, where the goods had been removed from the premises the night before the rent became due, Lord *Ellenborough*, C. J., declared (e) that, upon this point, he entertained some considerable doubts; and, but that the case before him turned upon another point, would have reserved it for the opinion of the Court, yet the law, as laid down by Chief

(b) *Ibid.* l. 41. Co. Lit. 161. a. Acc. 2 Wms. Saund. 284. n. (2.)
2 Inst. 131.

(c) Co. Lit. 161. a.

(d) *Watson v. Main*, 3 Esp. 15.

(e) *Furneaux v. Fotherby*, 4
Camp. 136.

Justice *Eyre*, has since been recognised and confirmed on argument by the Court of Common Pleas. (*e*)

It was formerly held that a removal in the face of day, not being a clandestine removal, was not within the meaning of the statute, which, it was said, applied only to cases where the removal is carried on with secrecy. (*f*) But the application of the statute is now extended to all cases in which a landlord is, by the conduct of his tenant in removing goods from premises, for which rent is due, turned over to the barren right of bringing an action for his rent. Accordingly, where a tenant openly, and in the face of day, and with notice to his landlord, removed his goods, without leaving sufficient on the premises to satisfy the rent then due, and the landlord followed and distrained the goods: it was held that, although the removal might not be clandestine, yet, as it was fraudulent, (which was a question for the jury,) the landlord was justified under the statute. (*g*)

What shall be considered such a removal.

The *onus* is thrown on the landlord, of shewing there was not sufficient distress left on the premises after the removal. (*h*)

The statute applies to the goods of the tenant only; and a plea, justifying the following goods off the premises, must therefore shew that they were the tenant's goods and not a lodger's. (*i*)

If a creditor, with the consent of the debtor, removes goods from the premises, in payment of his debt, although with knowledge of the rent being in arrear, he does not incur the penalty inflicted by the act on persons aiding the tenant in removing. (*k*)

(*e*) *Rand v. Vaughan* and another, 1 Bing. 767. N. S.

M. 533.

(*f*) *Watson v. Main*, *ub. sup.*

(*i*) *Thornton v. Adams*, 5 M. & S. 38, *et vide* *Postman v. Harrell*, 6 C. & P. 225.

(*g*) *Opperman v. Smith*, 4 D. & R. 33.

(*h*) *Parrey v. Duncan*, 1 Moo. &

(*k*) *Bach v. Meats*, 5 M. & S. 200.

To enable a party to distrain under the statute, he must have a reversion or vested interest expectant on the expiration of the lease. (*l*)

It may be taken on a common appurtenant.

By the same statute, s. 8, the landlord may distrain the cattle or stock of his tenant for rent arrear upon any commons, appendant, or appurtenant, or any ways belonging to the premises demised. Independently of this statute, which is confined to rights of common, the landlord cannot distrain upon that which the tenant enjoys as a mere privilege or easement, for the rent which issues out of the *land* demised, and in respect of which the privilege or easement has its existence. (*m*)

What things may be taken.

The goods which may be taken under a distress for rent are in general all the moveable things which may be found upon the demised premises, whether they be the property of the tenant or of another person. To this general rule there are, however, many exceptions; arising either from the circumstance that a distress was formerly a mere *pledge* to the landlord for the payment of his rent,—or from the care which the law takes that while the interest of an individual is served, the common good of the public shall not be thereby prejudiced. To these two heads almost all the exemptions in favour of particular things may be referred: some of which exemptions are held good in all cases; others merely *sub modo*, protecting the chattel only so long as there is something else upon the premises to satisfy the distress.

What are exempted.

Before proceeding to the enumeration of the goods and chattels which are either absolutely or conditionally exempted from seizure under a distress for rent arrear, it may be observed, generally, that the right of seizure is confined to moveable chattels.

(*l*) *Pluck v Digges*, 1 Dow. & Clark. 180

(*m*) *Buszard v. Capel*, *supra*.

1. Things which are fixed to the freehold cannot be distrained; as doors, windows, furnaces, and the like, which are as it were part of the house or land. (n) Nor does a mere temporary disunion of such things from the freehold for a necessary and beneficial purpose suspend the privilege: and, therefore, a mill-stone, which is exempted as a fixture to a mill, cannot be distrained if it be temporarily removed for the purpose of being picked for the use of the mill; though it would be otherwise if it were wholly and permanently severed from the mill. (o)

1. Things fixed to the freehold, except growing crops, &c.

For the same reason corn, grass, &c., growing upon the land, could not at common law be distrained; (p) but by the 11 Geo. II. c. 19, s. 8, it is provided that the landlord, or his bailiff or steward, may take and seize as a distress for arrears of rent all sorts of corn and grass, hops, roots, fruits, pulse, and other product whatsoever, growing upon any part of the estate demised; and the same may cut, gather, make, cure, carry and lay up *when ripe*, in the barns, or other proper place on the premises; and if there should be no barn or proper place on the premises, then in any other barn or proper place which the landlord shall hire or procure as near as may be to the premises; and in convenient time, appraise, sell, or otherwise dispose of the same towards satisfaction of the rent and of the charges of such distress, appraisement, and sale; in the same manner as other goods and chattels may be seized, distrained, and disposed of; and *the appraisement thereof to be taken when cut, gathered, cured, and made, and not before*. Provided that notice of the place where such distress shall be lodged shall, in one week after the lodging thereof, be given to the tenant, or left at the last place of his abode; and that if the tenant, his executors, administrators, or assigns, shall pay or tender the arrears of rent and costs of the distress before the corn, &c.,

11 G. II. c. 19.

(n) Co. Lit. 47. b. Niblet v. Smith, 4 T. R. 504. And see Winn v. Ingilby, Bart. 5 B. & A. 625. Query as to machinery fixed to the floor of a factory by bolts. Duck v.

Braddyl, 13 Price, 459. S. C. M'Clel. 217.

(o) Year Book, 14 Hen. VIII. 25. b.

(p) 1 Rol. Abr. 666. l. 47.

be ripe and cut, the distress shall cease, and the corn, &c., be delivered up. (*q*)

The 19 sect. provides, that if any distress shall be made for rent justly due, and there is any subsequent irregularity, the distress shall not, therefore, be deemed unlawful or the party making it a trespasser by *initio*; but the party aggrieved shall have full satisfaction for the damage sustained thereby, and no more, in an action of trespass, or on the case at his election.

On this statute, it has been decided that no sale can legally take place of the standing corn until after appraisement, and as no appraisement can take place until after the corn is ripe, a sale before the corn is ripe is void. (*r*) But if the price obtained is the full value which the corn would have fetched if sold at a proper time, and the rent exceeds the amount, the tenant will be entitled to nominal damages only. (*s*) In case of non-appraisement, the tenant will, if the value exceeds the rent due, be entitled to the actual value of the goods *minus* the rent, and the amount of special damage. (*t*)

Trees in nursery grounds.

This statute, it has been decided, does not extend to trees growing in a nursery ground; which remain, therefore, like other parts of the realty, undistrainable. (*u*)

Grantee of annuity.

It is also decided, that the statute does not enable the grantee of an annuity to distrain standing corn, under a power to distrain for the arrears of his annuity. (*v*)

2. Things part of the demise.

2. It has been laid down as a rule at the bar, that a

(*q*) Sect. 9.

(*r*) *Owen v. Legh*, 3 B. & A. 470.

(*s*) *Proudlove v. Twemloe*, 1 Cr. & M. 326, *et vide* *Glover v. Coles*, 7 Moore, 231. 1 Bing. 6.

(*t*) *Biggins v. Goode*, 2 Cr. & J. 364, *et vide* *Knott v. Curtis*, 5 C. &

P. 322. 2 Tyr. 449. (note).

(*u*) *Clark v. Calvert*, 3 Moore, 96. *S. P. Clark v. Gaskarth*, 8 Taunt. 432.

(*v*) *Miller v. Green*, (in Error) 8 Bing. 92. 1 Moo. & Sc. 199. 2 Cr. & J. 142. 2 Tyr. 1.

distress can not be taken of a thing which is part of the subject of the demise; and the Court observed, that the rule was in general true. (v) And the same proposition is stated in *Brooke's Abridgement*, (w) where it is said, that if a man lease tithes (without land) rendering rent, the lessor may have debt, but cannot distrain the tithes, because they are the things leased. In a modern case, a distress was taken for the rent of ready furnished lodgings, and the Court agreed that this distress was legal; but it does not appear that any part of the furniture was taken, so that the question of the legality of taking a part of the thing demised was not agitated. (x)

3. The thing taken must be the valuable property of some person: therefore, things in which a man can have no property are not liable to be taken for a distress, as animals *feræ naturæ*; and, according to Lord Coke, "dogs, bucks, does, conies, and the like." (y) But it was observed by Lord Chief Justice Willes, in a case above cited, that the rule with respect to dogs was plainly too general; because it is clear that a man may have a valuable property in a dog. (z) And with respect to deer, it was in the same case expressly decided, that though deer in a chase or forest, or park, properly so called, might fall within Lord Coke's rule of exemption, (a) yet where they are kept in an inclosure as a matter of profit or value, they are no longer free from liability to distress. (b)

4 & 5. Things which cannot with certainty be identified, or which cannot be returned to the owner in as good a condition as at the time they were taken, are also exempt from distress. For it would be incompatible with the notion of a mere pledge, that it could not be returned

(v) *Davies v. Powell*, Willes, 50.

(z) Willes, 48.

(w) *Distresse*, 67, 80. And see Year Book, 11 Hen. IV. 40. b.(a) Besides deer, in such places, are part of the inheritance, *ibid.*(x) *Newman v. Anderton*, 2 N. R. 224.(b) *Davies v. Powell*, Willes, 46. S. C. 7 Mod. 249, and 3 Bl. Com. 7, 9.

(y) Co. Lit. 47. a.

2 W. & M.
c. 5, s. 3.

in specie: and it would be unjust to take such things as might be injured and lost to the lessee by detention. (c) Therefore, loose money, meal, or the like, unconfined in a bag or sack, and consequently bearing no mark by which it may be known, cannot be distrained: but when enclosed in a bag, which may itself be marked and known, and so effect the identification of its contents, the objection ceases. (d) So, loose sheaves of corn, straw, and hay, in a barn, were protected; though sheaves which were deposited in a cart, might with the cart be taken, because they were thereby distinguishable from all other sheaves, and might without difficulty be returned: (e) but by the 2 Wm. and Mary, c. 5, s. 3, it is enacted, "that it shall be lawful for any person, having arrear of rent, to seize and secure any sheaves of corn, or corn loose, or in the straw, or hay, being in any barn or granary, or upon any hovel, stack, or rick, or otherwise upon any part of the land or ground charged with such rent; and to lock up or detain the same in the place where the same shall be found, until the same shall be replevied or sold."

Eatage not
distrainable.

The eatage on a farm is not distrainable, (f) and if in an intended sale by a creditor of the goods and eatage, the landlord consents that the sale shall proceed on his being paid his arrears out of the proceeds, and the amount does not prove sufficient for the purpose, he cannot distrain the cattle of the purchaser of the eatage. (g)

6. Goods of a
stranger being
upon the pre-
mises for pur-
poses of trade.

6. Though the property of a third person found upon the premises is in general liable to be taken, yet where such property has been delivered over to the lessee for some purpose connected with the trade, it shall on that account be privileged from distress. (h) A horse sent to a farrier's shop, shall not be distrained for the rent of the shop; nor shall

(c) *Cooper v. Pollard*, 1 Rol. Abr. 667, l. 16.

(d) *Ibid.* 666, l. 49.

(e) *Ibid.* l. 11, &c. *Cowper v. Pollard*, Sir W. Jones, 197. *Wilson v. Duckett*, 2 Mod. 61. S. C.

1 Freem. 202.

(f) *Vide*, 1 C., M. & R. 699.

(g) *Horsford v. Webster*, *ibid.* 696.

(h) Bro. Abr. *Distresse*, 99.

yarn sent to a weaver's; nor cloth sent to a taylor's, whether it be unmade or made into garments; nor sacks of corn sent to a mill to be ground, or to a market to be sold, (*i*) nor goods sent to an auctioneer to be sold; (*k*) nor an animal sent to a butcher to be slaughtered for the sender, although himself a butcher; (*l*) or corn sent to a factor to be sold, although deposited by him in the warehouse of a granary keeper. (*m*) And so the goods of a principal in the hands of a factor for sale, cannot be distrained for rent due from the factor, (*n*) nor can goods consigned to a broker for a sale, and placed by him for safe custody, in a warehouse over the wharf at which they were landed, be distrained for rent due in respect of the wharf and warehouse; (*o*) so a horse sent to a market with corn is protected: or to a mill with corn to be ground, and remaining at the mill door during the grinding. (*p*) And where a man sent a horse laden with yarn to a neighbour's to be weighed, whose lessor just then entered for a distress, it was holden that neither the horse nor yarn were distrainable. (*q*) This privilege likewise extends to goods delivered to a common carrier, or to any man who undertakes to convey goods for hire; and therefore, though a distress be made in the house at which he puts up, the goods he has in charge cannot be distrained. (*r*) Horses and carriages also standing at an inn are privileged from distress, upon the same principle as goods deposited for the purpose of trade; (*s*) so that it seems unnecessary to refer their exemption to the obligation which the laws lays upon the innkeeper of receiving them; (*t*) because the privilege is in fact rather for the benefit of the owner than of the innkeeper. In one case, however, where a race-horse was kept in a

(*i*) Co. Lit. 47. a. b. 1 Rol. Abr. 668, l. 35, 43.

(*k*) Adams v. Grane and another, 1 Cr. & Mee. 380.

(*l*) Brown v. Shevill, 2 Ad. & Ell. 138. 4 Nev. & M. 277.

(*m*) Matthews v. Mesnard, 2 C. & P. 353.

(*n*) Gilman v. Elton, 3 B. & B. 75.

(*o*) Thompson v. Mashiter, 1 Bing. 283.

(*p*) Read v. Burley, Cro. Eliz. 549, 56. S. C. Noy, 68.

(*q*) *Ibid.*

(*r*) Gisburn v. Hurst, 1 Salk. 250.

(*s*) Co. Lit. 47. a.

(*t*) *Vide* Robinson v. Walter, 3 Bulstr. 270, and Burr. 1499.

stable belonging to an inn, but which lay half a mile from it, the Court of Common Pleas held that the horse was liable to be distrained. (*t*) And in the case of *Francis v. Wyatt*, where a gentleman's chariot standing at a livery-stable was seised under a distress for the stable-keeper's rent, the Court of King's Bench, though they gave no formal decision as to its liability to be distrained, seem to have entertained a strong opinion in the affirmative. (*u*)

7. Things in
custodia legis.

7. Things already in the custody of the law, as a distress taken damage feazant, cannot be distrained; (*v*) though it has been held, that where the plaintiff in replevin has been nonsuited, the avowant may distrain the same goods for rent since accrued, before the execution of the writ *de retorno habendo*. (*w*) So goods taken in execution, though remaining on the premises, cannot at common law be distrained: (*x*) and this protection continues until after the sale; and in like manner, growing crops sold under a *fi. fa.* remain *in custodia legis*, and are consequently protected from distress, until after they are severed from the land, and a reasonable time for carrying them has elapsed, unless the purchaser allow them to remain uncut an unreasonable time after they are ripe. (*y*) But if the execution is irregular, they will not be protected. (*z*)

8. Things in
actual use.

8. Things also in actual use are protected from distress for rent; as the hatchet with which a man is working, (*a*) the clothes which he is wearing, (*b*) the horse which he is riding: (*c*) which exemption arises from the anxiety with

(*t*) *Croser v. Tomlinson*, Barnes, 472, *et vide*, Gilb. Dis. 35.

(*u*) Burr. 1498. S. C. Bl. Rep. 483, *et vide* Gilb. *supra*.

(*v*) Co. Lit. 47. *et vide b, supra*.

(*w*) *Hefford v. Alger*, 1 Taunt. 218.

(*x*) *Rex v. Cotton*, Park. Rep. 120. *Eaton v. Southby*, Willes, 136.

(*y*) *Peacock v. Purvis*, 2 B. & B.

362, *et vide* *Wright v. Dewes* and another, 1 Ad. & Ell. 641. 3 Nev. & M. 790. *Parslow v. Cripps*, Com. 203.

(*z*) *Blades v. Arundale*, 1 M. & S. 710.

(*a*) Co. Lit. 47. *a*.

(*b*) *Ibid.* Viscountess Bindon's case, Moore, 214.

(*c*) *Storey v. Robinson*, 6 T. R. 138.

which the law guards against any incitement to a breach of the peace. A cart loaded with corn is, therefore, said to be privileged if a man be upon it; (*d*) and it has also been decided that a stocking frame, (*e*) or a weaver's loom, (*f*) cannot be distrained while any person is employed upon it. (*g*) Nor can goods delivered by a manufacturer to a weaver, to be worked up at his own house, be distrained for rent. (*h*)

9. The beasts of a *stranger*, though in general liable to be taken, if found upon the premises demised, are not distrainable where they have entered the lands under particular circumstances.

Cattle put by their owner, or by his consent, upon the land to agist, or for any other purpose, are immediately liable to be distrained; (*i*) except where they are in their way to a market, and are turned in for the night for their necessary refreshment with the privity of the lessor or lessee, in which case it is now settled that they are privileged for the public benefit. (*k*) Where the cattle of a stranger break through the fences, and enter the tenant's land, they are distrainable for the landlord's rent immediately; (*l*) and so if the owner of the cattle be bound to repair the fences, and by his negligence in not repairing, his beasts escape into his neighbour's lands. (*m*) But where there are no sufficient fences to divide the stranger's from the tenant's lands, the lessor cannot distrain them for rent arrear until after they have been *levant and couchant* upon the tenant's land. (*n*) If the lessor

Cattle of a stranger, agisting on the premises, on their way to a market.

or on the premises through defect of fences, and not *levant and couchant*.

(*d*) *Welsh v. Bell*, 1 Ventr. 36. *et vide* Co. Litt. 47. n., 293.

(*e*) *Simpson v. Hartopp*, Willes, 512. *Watts v. Davies*, 1 Selw. N. P. 676. 9th edit.

(*f*) *Gorton v. Falkner*, 4 T. R. 565.

(*g*) *Fenton v. Logan*, 9 Bing. 678.

(*h*) *Wood v. Clarke*, 1 Crompt. & J. 484.

(*i*) *Read v. Burley*, Cro. Eliz. 549.

(*k*) *Tate v. Gleed*, C. B. Hil. 24 Geo. III. 2 Wms. Saund. 290. n.

(7). See *contra* *Fowkes v. Joyce*, 2 Ventr. 50. S. C. 3 Lev. 260. Lutw. 1161.

(*l*) Co. Lit. 47. b.

(*m*) *Gill v. Gawin*, 2 Rol. Rep. 124.

(*n*) *Kimp v. Cruwes*, Lutw. 1577, 1580. *Lacy's case*, Palm. 43. *Jordan v. Martin*, 1 Mod. 63.

or his tenant were bound to repair the fences, and their negligence enabled this stranger's cattle to escape and enter the land, the lessor shall not be permitted to distrain them, though they may have been *levant and couchant*, until actual notice has been given to the owner, and he, after reasonable time allowed him, neglects to remove them. (o) And in all cases, if the owner make fresh pursuit, and immediately endeavour to bring back his cattle, they are not distrainable. (p) If the cattle are put upon the land by the consent or connivance of the lessor, or any fraud appears upon his part, equity will relieve the owner; (q) and where A., tenant in common with B., leases his share, the cattle of B., or any other person, depasturing by his license, cannot be taken by A. for rent due from his tenant. (r)

The above nine classes of things are absolutely exempt from distress. It remains to mention those which are privileged *sub modo*, and which shall not be taken so long as other property remains on the premises sufficient to satisfy the distress.

1. Implements
of husbandry
and beasts of
the plough.

First, Cattle and implements employed in husbandry and the maintenance of a man's family, amongst which beasts of the plough, saddle-horses, sheep, poultry and fish are enumerated by Lord Coke. (s)

But as the landlord has a right to resort to subjects of distress immediately available, he is not liable to an action for taking beasts of the plough, where the other sufficient distress consists of *growing* crops. (t)

(o) Lutw. 1580. Gilb. Dis. 37. *Contrà* Poole v. Longueville, 2 Saund. 289. S. C. 2 Keb. 660, 729. 3 Salk. 166. But see the remarks of Saunders on Poole v. Longueville, and Mr. Serjeant Williams's note.

(p) Reynolds v. Okeley, Hob. 265. S. C. Brownl. 170.

(q) Fowkes v. Joyce, 2 Vern. 129. S. C. Prec. in Ch. 7.

(r) Kempe v. Cory, 2 Vent. 283.

(s) 2 Inst. 132. Rol. Abr. 667. l. 33. See also statute 51 Hen. III. st. 4. Dawson v. Alford, Dyer, 312. a. Vinkinstone v. Edden, Carth. 357. Jenner v. Yolland, 6 Price, 3.

(t) Piggett v. Birtles, 1 Mees. & W. 441.

2. Implements of trade, (*u*) under which head the books of a scholar are according to the oldest authorities exempted ; (*v*) and so, in the cases above alluded to, it seems to have been agreed, that although no person had been employed upon them, the stocking frame (*w*) and the loom (*x*) should not have been taken so long as other distrainable things remained on the premises. (*y*)

2. Implements of trade.

3. According to Sir Edward *Coke*, armour, wearing apparel, jewels, and household utensils, partake of the same qualified privilege. (*z*) But, it seems, the apparel may be taken, if not in actual use, although taken off for natural repose. (*a*)

3. Wearing apparel.

If the landlord agree not to distrain the goods of the undertenant so long as the latter pays his rent to the original lessee, the landlord is not estopped from distraining, if he has not notice of a tender made by the undertenant of his rent to his lessor. (*b*)

It now remains to inquire how the landlord's remedy by distress stands affected :—1. by the seizure of the tenant's goods under an execution, or extent ; 2. by the tenant's becoming bankrupt ; or, 3. by the landlord's taking a bond or other security for his rent.

Landlord's remedy by distress how affected.

1. By the common law, when an execution was levied upon the tenant's goods, the landlord lost his rent, and could not enter to distrain ; for the execution took place of all debts except *specific liens* ; (*c*) and the goods taken by the sheriff being *in custodia legis* could not be distrained. (*d*)

1. By execution against tenant's goods.

(*u*) Co. Lit. 47. a.

(*v*) *Ibid.*

(*w*) Simpson v. Hartop, Willes, 512.

(*z*) Gorton v. Falkner, 4 T. R. 565.

(*y*) Fenton v. Logan, 9 Bing. 678. 3 Moo. & Sc. 82.

(*z*) 2 Inst. 132. Viscountess

Bindon's case, Moore, 214. Baynes v. Smith, 1 Esp. Rep. 206.

(*a*) Bissett v. Caldwell, Peake, 50.

(*b*) Welsh v. Rose, 6 Bing. 638.

4 Moore & Payne, 484.

(*c*) Per Pratt, C. J., in Henchett v. Kimpson, 2 Wils. 141.

(*d*) *Supra*, p. 453.

Sheriff bound
to pay over
one year's rent.

8 Ann. c. 14.

The legislature, however, in aid of the landlord, has made it imperative upon the sheriff, before he removes the goods taken in execution, to pay over to the landlord one year's rent. For by statute 8 Ann. c. 14, for the more easy and effectual recovery of rents reserved on leases for life or lives, term of years, at will, or otherwise, it is enacted, that no goods or chattels whatsoever, lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any *execution* on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are, or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution; provided the said arrears do not amount to more than one year's rent; and, in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment, as he might have done before the making of the act; and the sheriff or other officer is thereby empowered and required to levy and pay to the plaintiff, as well the money so paid for rent, as the execution money.

“ Provided that nothing in the act be construed to extend to hinder or prejudice her Majesty, her heirs or successors, in the levying, recovering, or seizing any debts, fines, penalties, or forfeitures due or payable to her Majesty, &c., but that it shall and may be lawful for her Majesty, &c., to levy, recover, and seize such debts, &c., in the same manner as if the act had never been made.” (e)

The words “ party at whose suit the execution is sued

(e) Sect. 8.

out, &c.," are to be construed to mean either the plaintiff or defendant whose judgment and execution it is. (*f*)

But if the landlord himself seize the goods of his tenant under an *execution*, and is afterwards compelled to refund to the assignee of the tenant, (bankrupt or insolvent,) he cannot, as against the assignee, retain the amount of a year's rent under the statute of Anne. (*g*)

Under this statute the sheriff is bound to levy first for the rent, and then for the execution. (*h*) But the landlord can demand no more than one year's rent; (*i*) and he can only claim rent due at the time of the seizure of the goods under the execution, and not that which accrues after the taking and during the continuance of the sheriff in possession. For the words of the statute expressly point out the time of the taking, and show that the legislature contemplated one case only in aid of the landlord, *viz.*, that of providing against an execution sweeping away what is due for rent at the time the seizure is made. (*k*) But where the lease stipulates for a fore-hand rent, to be paid in advance, the sheriff is bound to pay this over to the landlord. (*l*) If the sheriff remain beyond a reasonable time upon the premises so as to injure the rights of the landlord, the latter may have his remedy by an action upon the case. (*m*)

Where the sheriff takes corn in the blade under a *fieri facias*, and sells it before the rent becomes due, he is not liable to account to the landlord for rent accruing due subsequently to the levy and sale; although he has notice of the landlord's claim, and though the corn remains upon the premises until a considerable proportion of the rent has

(*f*) 2 Wils. 141.

(*g*) Taylor and another, assignees of Mellers an insolvent *v.* Lanyon, 6 Bing. 536, *et vide* Lee *v.* Lopes, 15 East, 230.

(*h*) Colyer *v.* Speer, 2 B. & B. 67.

(*i*) *Ibid.*

(*k*) Hoskins *v.* Knight and Basset *v.* same, 1 M. & S. 245.

(*l*) Harrison *v.* Barry, 7 Price, 690.

(*m*) 1 M. & S. 247.

become due. (n) Nor can the landlord in this case distrain; notwithstanding the *dictum* to the contrary in *Gwilliam v. Barker*. (o)

Though there are several executions, the landlord can claim no more than one year's rent. As if two years' rent be due, and after the landlord has been paid one year's rent out of an execution, another execution goes upon the premises, he cannot demand the other year's rent out of this second execution; for the statute meant only to give him a *lien* as to one year, and has left him without further remedy if he have suffered greater arrears to accrue. (p)

The sheriff is bound to pay over to the landlord a year's rent, without making any deduction thereout for his poundage. (q)

The right to a year's rent under the statute extends only to the tenant's immediate landlord; and, therefore, the ground landlord cannot claim a year's rent upon an execution against the under-tenant. (r)

This statute, however, applies, it seems, to goods in an apartment, parcel of a messuage, (s) and the landlord is entitled to a full year's rent, notwithstanding his having made a voluntary reduction in favour of his tenant. (t)

The statute extends to executions for costs, &c.

to outlawry.

The statute applies to all executions at the suit of the subject. The landlord is, therefore, entitled to one year's rent, before a defendant can sell under an execution for the costs of a nonsuit; (u) and so in the case of a *capias utlagatum*, at the suit of the party; that being considered as a

(n) *Gwilliam v. Barker*, 1 Price, 275.

(o) *Peacock v. Purvis*, 2 B. & B. 362. *Wright v. Dewes* and another, 1 Ad. & Ell. 641. 3 Nev. & M. 790.

(p) *Dod v. Saxby*, Str. 1024.

(q) *Gore v. Goston*, Str. 643.

(r) *Ex parte Bennett*, Str. 787. *Carr v. Goldington*, cited, *ibid*.

(s) *Thurgood v. Coventry*, 4 C. & P. 481.

(t) *Williams v. Lewsey*, 8 Bing. 28.

(u) *Henchett v. Kimpson*, 2 Wils. 140.

mere private execution. (v) And, therefore, where a sheriff's officer, being in possession of the tenant's effects under an outlawry, made a distress for rent on behalf of the landlord, and sold the goods so distrained, but refused to pay the landlord the rent, the outlawry was reversed; it was held that the officer was liable for the produce of the goods to the landlord in an action for money had and received; and that he would have been liable for a year's rent under the statute, even if the outlawry had not been reversed. (w) And so it seems that a sequestration is an execution within the statute; and the landlord will thereupon be entitled to receive a year's rent in preference to the other creditors. (x) and seques-
tration,

The statute, however, expressly saves the rights of the crown; and, therefore, where the tenant's goods are seized under an extent, the landlord has no means of recovering his rent. (y) And where the goods of the tenant were taken under an extent *in aid*, the Court of Exchequer held, that this being a prerogative process, and in effect operating for the benefit of the crown, was within the exception in favour of the crown. (z) And where goods seized under an extent in aid had been kept by the officer for a long time locked up on the premises, pending a reference of the prosecutor's claim, during which an arrear of rent accrued due to the landlord, the Court of Exchequer refused to interfere in his behalf, so far as to order the effects to be sold, and the rent in arrear to be paid to him out of the produce. (a) but not to
extents by the
crown.

And if a distress is made for rent, and before the five days given by act of parliament are expired an extent issues, though not levied, for a debt due to the crown, the extent shall take place of the distress; because the dis-

(v) *Greaves v. D'Acastro*, Bunb. 194.

(w) *St. John's College, Oxford v. Murcott*, 7 T. R. 259.

(x) *Dixon v. Smith*, 1 Swanst. 457.

(y) *Rex v. Southerby*, Bunb. 5. *Rex v. Pritchard*, *ibid.* 269.

(z) *Rex v. De Caux*, 2 Price, 17.

(a) *Rex v. Hill*, 6 Price, 19, *et vide* Gilb. Dis. 41.

trainer neither gains a general nor a special property, nor even the possession of the cattle or things distrained. The distress is only a pledge in his hands for the rent; whereas the extent binds the property of the goods of the king's debtor from the *teste* of it. (b) And where a landlord has distrained for rent in arrear, and the tenant has replevied the goods, and has sold a part on his own account by permission of the landlord, if in the mean time the remainder are seized under an extent *tested* after the distress for a debt due to the crown, which is satisfied thereout according to the exigency of the writ; the Court of Exchequer cannot, in the exercise of its equitable jurisdiction, interfere to enlarge the time for the return of the process, that the sheriff may in the interim proceed under it against the defendant's *lands* for the landlord's indemnity, on the ground that the defendant *had not pending the distress goods and chattels sufficient* to satisfy the crown's debt, or in any way use the process of the crown in favour of the landlord under such circumstances; because, immediately on the levy having been made, the writ would be *functus officio*. (c)

Sheriff how
compellable
to pay rent.

By motion;

In order to compel the sheriff to pay over the year's rent, the landlord may move the court that he may be paid what is due to him out of the money levied, if sufficient for the purpose; or otherwise as much as it will satisfy. (d) But upon such motion he ought distinctly to shew the nature and amount of his claim. (e) This motion may be made even after the goods are removed from the premises, so long as they or the proceeds remain in the hands of the sheriff; the sheriff being bound, upon notice of the landlord's claim, though after the removal of the goods, to retain one year's

(b) Adjudged in the Exchequer, and affirmed on Error, *Rex v. Cotton*, 2 Ves. 288. S. C. Park. Rep. 112, *et vide* Gilb. Dist. 40.

(c) *Rex v. Hodder*, 4 Price, 313.

(d) *Henchett v. Kimpson*, 2 Wils.

141. *Darling v. Hill*, Ca. temp. Hardw. 255. *Hann v. Capell*, Barnes, 199.

(e) *Cook v. Cook*, Andr. 217. *Colyer v. Speer*, 2 B. & B. 67.

rent out of the proceeds of the tenant's goods taken in execution. (*f*)

If the sheriff, after due notice of the landlord's claim suffer the goods to be sold under the execution, and *removed* from the premises, without having paid over to the landlord a year's rent, he will be liable to an action upon the case founded upon the statute. (*g*) In order, so to charge him as a wrong doer it must be alleged and shewn in proof, that he had notice of the landlord's demand. (*h*) It is not, however, necessary that he should be served with a specific notice from the landlord, if the knowledge can by any other means be brought home to him: (*i*) and the general allegation "well knowing the premises" will, it seems, be sufficient. (*k*) And since, by the words of the statute, he is only bound to pay the rent *before the removal*, it seems to follow that no action will lie against him until *after* the removal has taken place. According to a short and imperfect note in Barnes, a bill of sale was held to be a removal of goods taken by a *fieri facias*: (*l*) but this appears to have been upon motion; in which case it is clear that the sheriff, having received the proceeds under the bill of sale, would be compellable to pay a year's rent to the landlord. (*m*) It is also to be observed, that after the sale, the landlord no longer stands in need of the assistance of the statute, because as soon as the execution is executed, the goods being no longer in *custodia legis*, may, if they remain upon the premises, be distrained upon by the landlord, notwithstanding the sale: and in like manner, standing crops, though protected after the sale, until they be cut and a reasonable time has elapsed for their removal; yet if they are suffered to remain upon the

or by action
upon the case.

(*f*) Arnitt v. Garnett, 3 B. & A. 440. Colyer v. Speer, 2 B. & B. 67. But see Waring v. Dewberry, Str. 97. S. C. Fortesc. 360.

(*g*) Palgrave v. Windham, Str. 212. (*i*) Andrews v. Dixon, 3 B. & A. 645.

(*h*) *Ibid.* Waring v. Dewberry, Str. 97. Henchett v. Kimpson, 2 Wils. 140. Smith v. Russel, 3 Taunt. 400. Arnitt v. Garnett, 3

(*k*) Lane v. Crockett, 7 Price, 566.

(*l*) West v. Hedges, Barnes, 211.

(*m*) *Supra.*

premises, after such reasonable time has elapsed, their protection ceases, and they may be seized by the landlord. (m)

If the landlord accepts an undertaking from the sheriff's bailiff for payment of the year's rent, he loses the benefit of the statute. (n)

When liable.

If the sheriff once removes the goods, he cannot afterwards exonerate himself by returning them to the premises; for the landlord's right to distrain for his rent has been interrupted, for so long time as the goods have been in the custody of the law, (o) and the sheriff is liable if he remove *any* of the goods without retaining the rent; (p) for though he may have left property on the premises, the landlord is not called upon to shew that it was insufficient to satisfy his claim. And if the sheriff remove the goods before the execution creditor pays the year's rent, the Court will not stay proceedings against him on his payment into Court of the sum produced by the sale of the goods. (q)

If the sheriff seize goods under a *fi. fa.* which were then in possession of another person under a distress for rent, the sheriff will not be entitled to relief under the Interpleader Act of the 1 & 2 Wm. IV. c. 58, s. 6, it being the duty of the sheriff to ascertain if any rent is due, and if there is, to satisfy it. (r)

There must be an existing tenancy at the time of the levy.

The statute contemplates an existing tenancy at the time of the execution; where, therefore, the sheriff seized under a writ of *fieri facias*, and a writ of *habere facias possessionem* was subsequently delivered to him, in an ejectment at the suit of the landlord, on a demise made long before the issuing of the *fi. fa.* it was held, that the sheriff was not

(m) *Vide supra.*

(n) *Rothery v. Wood*, 3 Camp. 24.

(o) *Lane v. Crockett*, 7 Price, 566.

(p) *Colyer v. Sheer*, 2 B. & B. 67.

(q) *Calvert v. Joliffe*, 2 B. & Ad.

418, *et vide Grombridge v. Fletcher*, 2 Dowl. Prac. Ca. 353.

(r) *Haythorn v. Bush*, 2 C. &

M. 689. 2 Dowl. Prac. Ca. 641.

justified in allowing the landlord a year's rent; as the tenancy must have ceased on the day of the demise in the ejectment. (s)

Where, on the other hand, in an agreement for the sale and assignment of certain premises, there was a stipulation, "that in the mean time, and until the assignment was made, the intended purchaser should pay and allow to the seller at the rate of 100*l.* per annum, from the time of taking possession of the premises until the completion of the purchase;" the intended purchaser having taken possession, and one half-yearly payment having become due before the completion of the purchase: it was held, that the relation of landlord and tenant was created between the parties, and that such payment was due *as rent*, and that the sheriff levying on the goods of the occupier under a *fi. fa.*, was bound by the 8 Ann. c. 14, to pay it over to the seller as landlord, deducting thereout certain allowances which the vendor had agreed to make to the purchaser. (t)

A landlord is not entitled to a year's rent before the sheriff can sell goods seized under a *pone per vadios* issuing out of the Court of Pleas of Durham, in which case the goods are forfeited to the bishop, who afterwards, *ex gratiâ*, assigns them over to the party: (u) for though this may have the effect of an execution, it is not so in fact, and the statute speaks only of goods taken by virtue of an execution.

The action upon the case is maintainable, not only by the landlord, but if he die before the payment of the rent, by his executor or administrator; because the removal of the goods is a wrong to the estate of the deceased. (v) And so it may be maintained by the trustees of an outstanding satisfied term, assigned to attend the inheritance. (w)

The action
may be
brought by
the executor.

(s) *Hodgson v. Gascoine*, 5 B. & C. 467.

A. 88.

(v) *Palgrave v. Windham*, Str.

(t) *Saunders v. Musgrave*, 6 B. 212. *Chace v. Chace*, Fort. 359.

& C. 524.

(w) *Colyer v. Speer*, 2 B. & B. 67.

(u) *Brandling v. Barrington*, 6

Form of
declaration.

The declaration against the sheriff may state the facts generally, without entering into the particulars of the demise: and this is by far the safest course to pursue; for if the declaration assume to set out the particulars of the demise, a variance between the statement and the evidence will be ground of nonsuit. (*x*)

Proof.

So likewise it has been held sufficient to prove the tenant's occupation without showing that a year's rent is actually due; the onus of proving that the rent is satisfied being cast upon the sheriff. (*y*) And before the rent is paid, the sheriff should have some evidence of its being due, as otherwise he will be liable to answer for it; but slight evidence of the fact will be sufficient. (*z*)

Landlord may
waive his
right.

Where upon the goods of a tenant being taken in execution, an agent of the landlord took from the sheriff's officer an undertaking for a year's rent, and then consented to the goods being sold, Lord *Ellenborough* held, that although the rent had not been paid, the landlord had completely waived his right under the statute, and could maintain no action against the sheriff for not paying over a year's rent. (*a*)

Money had
and received
does not lie.

An action for money had and received cannot be maintained by the landlord against the sheriff, where the sheriff has removed and sold the goods, under a valid execution, without paying over a year's rent, (*b*) his proper action being on the case, but instead of bringing an action, he may move the Court that he be paid by the sheriff what is due to him out of the money levied. (*c*)

Stat. 56 Geo.
III. c. 50.
regulating the
sale of grow-
ing crops by
sheriffs, &c.

By the statute 56 Geo. III. c. 50, entitled, "an act to

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| (<i>x</i>) <i>Bristow v. Wright</i> , Dougl. 664. | 24. |
| (<i>y</i>) <i>Harrison v. Barry</i> , 7 Price, | (<i>b</i>) <i>Green v. Austin</i> , 3 Campb. |
| 690. | 260. |
| (<i>z</i>) <i>Keightley v. Birch</i> , 3 Campb. | (<i>c</i>) <i>Henchett v. Kimpson</i> , 2 Wils. |
| 521. | 140. |
| (<i>a</i>) <i>Rothery v. Wood</i> , 3 Campb. | |

regulate the sale of farming stock taken in execution," it is enacted, that no sheriff or other officer in England or Wales shall, by virtue of *any process of any court of law*, carry off or sell, or dispose of for the purpose of being carried off from any lands let to farm, any straw thrashed or unthrashed, or any straw of crops growing, or any chaff, colder, or any turnips, or any manure, compost, ashes or sea-weed, in any case whatsoever, nor any hay, grass or grasses, whether natural or artificial, nor any tares or vetches, nor any roots or vegetables, being produce of such lands, in any case where according to any covenant or written agreement entered into and made for the benefit of the owner or landlord of any farm such hay, grass, or grasses, tares and vetches, roots or vegetables, ought not to be taken off or withholden from such lands, or which by the tenor or effect of such covenants or agreements ought to be used or expended thereon; and of which covenants or agreements such sheriff or other officer shall have received a *written notice* before he shall have proceeded to sale. And the tenant is bound to give notice to the sheriff of the existence of covenants, and of the name and residence of the landlord; and the sheriff is bound to give notice to the landlord of the seizure of such crops; and, in case of the landlord's absence or silence, to postpone the sale until the latest day he can appoint for such sale. (d) And the sheriff is further bound before sale, to make due inquiry wherein the parish where the lands lie, as to the name and residence of the landlord. (e) Such sheriff or other officer executing such process may then dispose of any crops or produce to any person or persons who shall agree in writing with such sheriff or other officer, in cases where no covenant or written agreement shall be shewn, to use and expend the same on such lands in such manner as shall accord with the custom of the country; and in cases where any covenant or written agreement shall be shewn, then according to such covenant or written agreement, and after such sale or disposal so qualified, it shall be law-

(d) Sect. 2.

(e) Sect. 5.

ful for such person or persons to use all such necessary barns, stables, buildings, outhouses, yards, and fields, for the purpose of consuming such crops or produce as such sheriff or other officer shall allot or assign to them for that purpose, and which such tenant or occupier would have been entitled to and ought to have used for the like purpose on such lands. (f) And in all cases where any purchaser or purchasers of any crops or produce hereinbefore mentioned shall have entered into any agreement with such sheriff or other officer, touching the use and expenditure thereof on lands let to farm, it shall not be lawful for the owner or landlord of such lands to distrain for any rent on any corn, hay, straw, or other produce thereof, which, at the time of such sale, and the execution of such agreement entered into under the provisions of the act, shall have been severed from the soil, and sold, subject to such agreement by such sheriff or other officer; nor on any turnips, whether drawn or growing, if sold according to the provisions of the act; nor on any horses, sheep, or other cattle, nor on any beast whatsoever, nor on any waggons, carts, or other implements of husbandry, which any person or persons shall employ, keep, or use, on such lands for the purpose of thrashing out, carrying or consuming, any such corn, hay, straw, turnips, or other produce, under the provisions of the act, and the agreement or agreements directed to be entered into between the sheriff or other officer, and the purchaser of such crops and produce as before mentioned. (g)

By the same statute, no sheriff or other officer shall, by virtue of any process whatsoever, sell or dispose of any clover, rye-grass, or any artificial grass or grasses whatsoever, which shall be newly sown, and growing under any crop of standing corn. (h) And it is further provided that the act shall not extend to any straw, turnips, or other articles, which the tenant may remove from the farm, consistently with some contract in writing. (i)

(f) Sect. 3.

(g) Sect. 6.

(h) Sect. 7.

(i) Sect. 8.

This statute does not extend to seizures by virtue of crown process. (*k*)

2. For rent, due by a person who afterwards becomes bankrupt, the landlord may distrain, *before* the act of bankruptcy, for the whole amount due. *After* the act of bankruptcy, the landlord may distrain, even although the messenger be actually in possession of the goods upon the premises; (*l*) and formerly he might have distrained for the *whole arrears* of rent due; but by the bankrupt act, 6 Geo. IV. c. 16, (*m*) no distress for rent, made and levied, *after* an act of bankruptcy, upon the goods or effects of any bankrupt, (whether before or after the issuing of the fiat,) shall be available for more than one year's rent, accrued prior to the date of the fiat; but the landlord, or party to whom the rent shall be due, shall be allowed to come in as a creditor under the fiat for the overplus of the rent due, and for which the distress shall not be available.

Distress, how affected by bankruptcy.

6 Geo. IV. c. 16.

By the Insolvent Debtors' Act, (*n*) it is provided, that no distress or distresses for rent made and levied *after* the arrest or other imprisonment of any person who shall petition the Court for his or her discharge from such imprisonment according to that act, upon the goods or effects of such person shall be available for more than one year's rent, accrued prior to the execution of the conveyance and assignment by such person or persons in pursuance of that act, but that the landlord or party to whom the rent shall be due, shall and may be a creditor for the overplus of the rent due, and for which the distress shall not be available, and be entitled to all the provision made for creditors by that act. But this restriction does not apply if the distress is made *before the arrest*, although the sale is subsequent to it. (*o*)

By Insolvent Debtors' Act.

(*k*) *Rex v. Osborne*, 6 Price, 94.

(*m*) 6 Geo. IV. c. 16, s. 74.

(*l*) *Ex parte Plummer*, 1 Atk.

(*n*) 7 Geo. IV. c. 57, s. 31.

103. *Ex parte Jaques*, *ibid.* 104.

(*o*) *Wray v. Earl of Egremont*,

cit. *Ex parte Dillon*, *ibid.* cit.

4 B. & Ad. 722.

Buckley v. Taylor, 2 T. R. 600.

If the landlord suffer the goods of the bankrupt to be removed from the premises *without distraining them*, he loses his remedy by distress altogether, and can only come in and prove his debt under the fiat with the other creditors for the whole amount of rent due up to the date of the fiat; (*p*) for a fiat of bankrupt is not an execution within the meaning of the statute 8 Anne, c. 14; and, therefore, the landlord cannot avail himself of the equity of that statute, and claim a year's rent in preference to the other creditors; (*q*) and to entitle the landlord to any part of the goods of the tenant seized and sold by the assignees under the 6 Geo. IV. c. 16, he must have enforced his claim by distress. (*r*) And though the legislature has interposed to prevent the landlord from helping himself by distress to *more* than a year's rent, in prejudice of the general estate, it has not thought it necessary to make a provision in his favour analogous to that in the statute of Anne; for he is left at liberty to distrain for a year's rent even after the fiat is sued out, and is, therefore, secure to that amount if he use due diligence.

It was formerly held that, if after an act of bankruptcy, the tenant paid rent to the landlord, who was about to distrain, the payment could not be impeached by the assignees; (*s*) and the same doctrine, it should seem, would still hold good to the extent of a year's rent.

Where a tenant committed an act of bankruptcy, in October, 1810, upon which a commission issued on the 21st of January, 1811, and the sheriff, on the 7th of January, levied an execution at the suit of the landlord for a judgment debt of 600*l.*, under which he sold the goods of the tenant on the

(*p*) *Ex parte* Descharmes, 1 Atk. 103.

(*q*) *Ex parte* Devismes, MS. S. C. cited Burn's Justice, *Distr.* XVII. Co. Bankrupt Laws, 177. *Ex parte* Plummer, 1 Atk. 103.

Lee v. Lopes, 15 East, 230.

(*r*) Gethin v. Wilks, 2 Dowl. 189.

(*s*) Stevenson v. Wood, 5 Esp. 200, and see Mavor v. Croome, 1 Bing. 260. 8 Moore, 171.

21st and 22nd of January, for 520*l.*, and out of that sum when received paid the landlord 140*l.* for one year's rent in arrear, but the landlord had not distrained: the Court of King's Bench held, in an action for money had and received, brought by the assignees of the bankrupt tenant against the sheriff to recover the whole amount of the sum levied, that the property in the goods being changed by the act of bankruptcy and commission, and transferred to the assignees, it lay upon the sheriff to prove that he had paid over the money to the landlord and execution creditor before he had notice of the commission issued; and not giving such proof, that he was liable for the amount to the assignees, and that he was not entitled to deduct the 140*l.* paid over to the landlord as for the year's rent in arrear under the statute 8 Ann. c. 14. (t)

After the goods are replevied, there is no lien on them; but the landlord's remedy is on his replevin bond; and, therefore, where a landlord having distrained for rent, the tenant replevied the goods, and whilst the cause in replevin was pending, the tenant and the sureties in the replevin bond became bankrupt, it was held, both at law and in equity, that the assignees of the tenant having possessed themselves of the goods replevied, *and sold them*, the landlord had no lien on the goods. (u)

Though in general a landlord cannot distrain till the rent become due, yet if the agreement be otherwise, there is no objection to it in point of law. And it was decided, that where a trader, after committing an act of bankruptcy, took a shop, and agreed to pay half a year's rent in advance; by the custom of the country half a year's rent became due on the day on which the tenant entered: a commission having issued against the tenant, the landlord was held to be entitled, after

(t) *Lee v. Lopes*, 15 East, 230, Bing. 536.
et vide Taylor and another, assignees of Meller v. Lainger, 6 (u) *Bradyll v. Ball*, 1 Bro. Ch. Rep. 427.

the assignment, and before the year expired, to distrain the goods on the premises for half a year's rent; or supposing he should buy the tenant's goods at the sale under the commission, to retain the amount of the half year's rent from the purchase money. (z)

Where a tenant, who became bankrupt, owed the landlord twelve year's rent, and the landlord proved his debt under the commission, and permitted the assignees to sell the goods to a third person, who took possession of the goods, and lived upon the same premises with the bankrupt; the landlord, three years after proving his debt, distrained upon the goods as being still on the premises. Lord *Hardwicke*, after great consideration, declared, that the vendee of the goods under the assignees was entitled to them and restrained the landlord's proceedings, and confined him to his remedy under the commission. (a)

3. By taking
a bond, &c.

3. It seems that the landlord's right to distrain will not be waived or prejudiced by his accepting a note as a security for his rent; for where the tenant gave a promissory note for rent arrear, and took a receipt for it, and upon the landlord's afterwards distraining brought trespass, it was ruled by *Abdey, J.*, that the landlord might still distrain, and that the note did not alter the debt until it were paid. (b) And so it is said, that if the landlord accept a bond for the rent, this does not extinguish it, because the rent is of a higher nature; (c) nor an agreement to take interest on the arrears. (d)

In an action on the bond for the rent, the tenant cannot plead that the rent reserved by the lease is less in amount

(z) *Buckley v. Taylor*, 2 T. R. 600. And see *Harrison v. Barry*, 7 Price, 693.

(a) *Ex parte Grove*, 1 Atk. 103.

(b) *Harris v. Shipway*, Bull. N. P.

182. *Ewer v. Clifton*, *ibid.*

(c) Bull. N. P. *sub. sup.*

(d) *Skerry v. Preston*, 2 Chitt.

245.

than the rent mentioned in the condition to the bond, and has been paid. (e)

When the landlord intends to distrain, he must enter upon the lands in the day-time, that is, between the sun-rising and sun-set; for a distress for rent cannot be made in the night. (f) In order to entitle the landlord to distrain, no demand of the rent is necessary, unless the lease expressly provide for such demand; but for payment of penalty by way of *nomine pænæ*, or on re-entry for forfeiture for non-payment of rent, a demand is required any time after the rent becomes due. (g) Into any house or building the landlord may enter through the doors or windows: (h) but if these are fastened, he cannot lawfully break them open, (i) for inclosures or fences cannot be broken to take a distress. (k) And where a padlock had been put upon a barn door, Lord *Hardwicke* held, that the landlord could not break it, in order to seize the corn in the barn. (l) But if the outer door is open, the inner door may be broken. (m)

Distress must be made in the day-time;

and doors cannot be broken.

If after a distress has been taken, the man in possession quits possession, the landlord cannot, after the lapse of several days, re-enter by violence, whether the original entry was legal or not. (n)

In one case, where a landlord occupied an apartment over a mill demised to his tenant, from which it was separated by a floor only, without any ceiling, and in order to distrain took

(e) *Lainson v. Tremere*, 1 Ad. & Ell. 792. 3 Nev. & M. 603, *et vide* *Ingleby v. Mously*, 3 Moore & Scott, 488.

(f) Co. Lit. 142. a. Dr. & Stud. Dial. 2, c. 9. *Mirror*, c. 2, s. 26. *Aldenburgh v. Peaple*, 6 C. & P. 212, *et vide supra*.

(g) *Howell v. Samback*, Hob. 133. *Doe dem. Foster v. Wandlass*, 7 T. R. 117. And see *Grobham v.*

Thornborough, Hob. 83.

(h) 1 Rol. Abr. 671. l. 7.

(i) *Browning v. Dann*, Ca. temp. Hard. 168.

(k) Co. Lit. 161. a.

(l) 9 Vin. 127. pl. 6.

(m) Comb. 17. *Browning v. Dunn*, Bull. N. P. 81. *Gilb. Dist.* 56.

(n) *Russell v. Rider and another*, 6 C. & P. 416.

up the floor, and entered through the aperture, the Court of Common Pleas held, that the tenant could not maintain trespass, because even if he made out the landlord's floor to be his ceiling, he was still only tenant in common. "What is decided in this case," said *Mansfield*, C. J., "will not do much harm or good as a precedent, for probably the circumstance never happened before, or will ever happen again." (o)

Unless in the case of a fraudulent removal.
11 Geo. II. c. 19.

But by the statute, 11 Geo. II. c. 19, s. 7, (the first section of which authorizes the landlord, in case of a fraudulent removal, to pursue the goods within thirty days after such conveyance,) it is enacted, that where any goods or chattels, fraudulently or clandestinely conveyed or carried away by any tenant or lessee, or his servant, agent, or other person aiding or assisting him, shall be put, placed, or kept, in any house, barn, stable, out-house, yard, close, or place, locked up, fastened, or otherwise secured, it shall be lawful for the landlord, his steward, or other person empowered by him for that purpose, to take and seize, as a distress for rent, such goods and chattels, (first calling to his assistance the constable, headborough, borsholder, or other peace officer of the hundred, district, or place where the same shall be suspected to be concealed); and, in case of a dwelling-house, (oath being first made before a justice of the peace of a reasonable ground to suspect that such goods or chattels are therein,) in the day-time to break open and enter into such house, barn, stable, out-house, yard, close, and place; and to take and seize such goods and chattels for the arrears of rent, as he might have done, if they had been in an open place.

In reference to this section of the statute, it appears that the law is satisfied with calling in a special constable appointed for the occasion, although not a regular peace officer. (p) But a plea, justifying a breaking open a lock, in order to

(o) *Gould v. Bradstock*, 4 Taunt. 562.

(p) *Cartwright v. Smith*, 2 Moo. & Rob. N. P. 284.

distrain the cattle, must aver that a constable was present when the lock was broken. (*r*)

The landlord, or his bailiff, having entered and seized upon some goods, in the name of all, this will be a good seizure of all. (*s*) And where a landlord, to whom rent was in arrear, on hearing his tenant and a stranger dispute about the property of an article on the premises, declared, "the article shall not be moved till my rent is paid," it was held that the distress was well commenced by these words. (*t*)

The goods
must be
seized,

The next question is, how he is to treat the property so taken? In the first place, the distress must be impounded in a lawful pound. (*u*) A pound is either a pound *covert*, or close, or a pound *overt*, or open. Cattle may properly be put into a pound overt: but furniture and goods, which are liable to be damaged by the weather, or stolen by reason of their exposure, ought to be placed in a pound close, otherwise the impounder must answer for the loss. (*v*) By the statute of Marlbridge, 52 Hen. III. c. 4, the pound, whether close or overt, must be within the county where such distress is taken: but it has been holden that where lands, lying in two adjoining counties, are held under one demise at one entire rent, and the landlord distrains cattle in both counties for rent arrear, he not only may, but ought to drive them all into one county; though it is otherwise where the two counties do not join. (*w*) And by the statute 1 and 2 Philip and Mary, c. 12, no distress of cattle shall be carried out of the hundred, unless to a pound in the same county, not above three miles' distance, on pain of a penalty of 5*l.* and treble damages. Subject to these statutes the pound may be either public or private, (*x*) upon the lessor's or lessee's

and im-
pounded

within the
hundred

(*r*) *Rich v. Woolley and another*, 7 Bing. 651.

(*s*) *Dod v. Monger*, 6 Mod. Rep. 215.

(*t*) *Wood v. Nunn*, 5 Bing. 10.

(*u*) *Co. Lit.* 47. *b.*

(*v*) *Ibid.*

(*w*) *Walter v. Rumball*, Lord Raym. 54. S. C. Salk. 247. 4 Mod. 390. 12 Mod. 76.

(*x*) *Co. Lit.* 47. *b.*

lands, (y) or in any place where the tenant will not be guilty of a trespass by entering to inspect and feed his cattle. (z) For if the cattle be put into a pound overt, it is for their owner, who has access to them, to nourish and feed them at his own cost; (a) but if they be inclosed in a pound close, then, inasmuch as their owner has not access to them, the law casts the obligation to feed them upon the impounder, which he is bound to do at his peril. (b)

as soon as
taken;

Immediately that the distress is taken, the landlord is bound to impound it; (c) and he will not be allowed to put different parts of a distress into different pounds; but must impound the whole in one place, upon pain of 5*l.* and treble damages. (d) And the usual course is now to impound the distress for rent arrear, upon the premises where it is taken, pursuant to a power given to the landlord by the statute 11 Geo. II. c. 19, to turn any part of the premises upon which a distress is taken into a pound, *pro hac vice*, for the securing of such distress; and it seems that for such purpose, he may, on distraining goods in a cottage, lock up the cottage until sale. (e) And the same statute, ss. 8, 9, having made the growing crops distrainable, authorizes the landlord to cut, gather, and lay up the same when ripe, in barns or other places on the premises if any; and if not, in other barns or proper place as near as may be to the premises, notice thereof being given to, or left at the last place of abode of the tenant, within one week after the lodging of the distress.

and corn when
ripe may be
cut, &c.

Distress may
be prevented
by tender.

When the landlord or his bailiff has entered upon the premises to distrain, it is still competent to the tenant to prevent such distress by tendering the arrears of rent; and if after such tender a distress is taken, it is a wrongful

(y) Co. Lit. 47. b.

(z) Dr. & Stud. Dial. 2, c. 9.

(a) *Ibid.* Co. Lit. 47. b.

(b) *Ibid.* Gilb. Dist. 64.

(c) Dod v. Monger, *sup.*

(d) Stat. 1 & 2 Ph. & M. c. 12.

(e) Cox v. Painter, 7 C. & P. 767.
But see Washborn v. Black, 11 East,
405, note a.

seizure. (*f*) And even after the lord has distrained, and before he has impounded the goods, the tenant may claim their return by a tender of the arrears and the expenses of the distress; and if the landlord refuse to deliver them, it is a wrongful *detainer*. (*g*) But if the goods be once impounded, the tender comes too late; for they are then in the custody of the law. (*h*) And so where standing corn is distrained, the tenant may tender the rent at any time before the corn is ripe; and if the landlord afterwards take it, he will be a trespasser: (*i*) for corn, grass, and such things as are made liable to distress by the statute 11 Geo. II. c. 19, are an exception to the rule laid down generally as to goods, and by section 9, if the lessee, his executors or administrators, shall tender to the landlord, or his steward, or receiver of rents, the whole of the arrears of rent and incidental expenses after such distress shall have been taken, and at any time before it shall be ripe, and cut, cured, or gathered, the distress shall be thereupon delivered up to the lessee or his personal representatives.

The tender should be made to the landlord or to an agent authorized to receive the rent. (*k*)

In a recent case, a tender to the distrainer's wife, who had been in the usual habit of acting as his agent in such matters, was, in his absence, held sufficient. (*l*) It had, in a former case, been decided, that the tender need not be made to the broker who distrains, and that a tender to the landlord made a subsequent distress unlawful. (*m*)

(*f*) 2 Inst. 107. Six Carpenters' case, 8 Rep. 290.

(*g*) *Ibid.* Vertue v. Beasley, 1 Mood. & Rob. 21.

(*h*) Nevill v. Seagrave, Cro. Eliz. 332. Pilkington's case, 5 Rep. 76. Six Carpenters' case, *sup.* Crawley v. Kingswell, Hob. 207. Allen v. Bayley, Lutw. 1596. Firth v. Purvis, 5 T. R. 432. Anscomb

v. Shore, 1 Campb. 288.

(*i*) Owen v. Legh, 3 B. & A. 470.

(*k*) Pilkington's case, *sup.* Winkelfelde v. Bell, 1 Rol. Rep. 258. And see Muffat v. Parsons, 1 Marsh. Rep. 55. S. C. 5 Taunt. 307.

(*l*) Brown v. Powell, 4 Bing. 230. 12 Moore, 454.

(*m*) Smith v. Goodwin, 1 Nev. & M. 371. 4 B. & Ad. 413.

Distress cannot be used.

When the distress is taken, it cannot be used ; therefore, cattle shall not be worked : (n) and, according to some authorities, cows distrained shall not be milked, even though it be for their benefit ; (o) but this doctrine is reasonably doubted by others, (p) and at best seems only to apply where they are put into a pound overt, to which the owner has access, so that he may milk them himself. (q) It is said, that if the landlord distrain raw cloth, he may cause it to be fulled ; (r) but that hides when distrained cannot be tanned ; because the tanning will prevent the tenant from recognizing his property. (s)

A landlord was informed that things of great value were deposited in a trunk which he had distrained ; he thereupon corded it for a greater security : it was adjudged that he had been guilty of a trespass. (t) It is difficult to conceive upon what principle this decision proceeded ; but in all cases, where an *injury* happens to the distress in consequence of any act of the landlord, however well intended, he must answer for it to the tenant ; as where a horse had several times escaped from a pound, and the landlord for greater security tied him to a stake in the pound, and the horse strangled himself with the rope. (u)

but now it may be sold

- The law insisted upon the landlord's keeping the distress thus sacred, upon the principle that it was a mere pledge in his hands for securing the payment of his rent. The same principle, therefore, forbade him to sell or dispose of it in order to reimburse himself. (v) But the statute, 2 William
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| (n) Chamberlayn's case, 1 Leon. 220. | (r) Duncomb v. Reeve & Green, Cro. Eliz. 783. |
| (o) Bagshawe v. Gilliard, 1 Roll. Abr. 673. l. 32. S. C. (Bagshawe v. Gawin,) Noy, 119. | (s) <i>Ibid.</i> |
| (p) Bagshawe v. Goward, Cro. Jac. 148. | (t) Anon. cor. Rolle, C. J., cited by Twisden, J., in Welsh v. Bell, 1 Vent. 37. |
| (q) Chamberlayn's case, 1 Leon. 220. | (u) 1 Roll. Abr. 673. l. 26. |
| | (v) Pledall v. Knapp, 1 Anders. 65. |

and Mary, sess. 1, c. 5, s. 2, has now made the proceeding by distress a speedy remedy for the non-payment of rent; for by that statute it is enacted, that where any goods shall be distrained for rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods distrained shall not, *within five days next after such distress taken* and notice thereof, (with the cause of such taking,) left at the chief mansion-house, or other most notorious place on the premises, replevy the same; in such case the person distraining shall, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish, or place, where such distress shall be taken, cause the goods so distrained to be appraised by two sworn appraisers, (whom such sheriff, under-sheriff, or constable shall swear to appraise the same truly according to the best of their understandings,) and after such appraisement may sell the same for the best price that can be gotten for them, for satisfaction of the rent *and charges* of the distress, appraisement, and sale; leaving *the overplus*, if any, with the sheriff, under-sheriff, or constable, for the owner's use.

In an action for not leaving the overplus in the sheriff's hands, the plaintiff may question the reasonableness of the charges. (x)

And, it seems, that where beasts of the plough are taken, (as they lawfully may be, if it do not appear that there is a sufficient distress without them,) (y) the landlord may *begin* by selling these before he has ascertained, by the sale of the other things, whether there is enough to satisfy the rent without them. (x)

Upon the words of this statute, it has been decided, that the notice may be served personally, as well as left at the *after notice*,

(x) *Lyon v. Tomkies*, and others,
1 Mees. & W. 603. 1 Tyr. & Gr.
810.

(y) *Supra*.
(z) *Jenner v. Yolland*, 6 Price, 5.
2 Chitt. 167.

mansion-house, &c., (a) and that it is not necessary to specify therein the time at which the rent became due. (b) This notice should, if served personally, be given to the tenant; because though, where the landlord takes the goods of a stranger, it would be an answer to any action by the stranger, that a regular notice had been given before the sale; yet if the tenant replevy, no notice having been given to him, the notice given to the owner would not avail the landlord against the tenant. (c)

and five days
expired.

The notice having been given, and the five days having expired, the landlord may proceed to the appraisement and sale, except in the case of growing crops, which are not appraisable until after they are ripe and severed. (d) The five days mentioned in the statute, are exclusive of the day of seizure, and inclusive of the day of sale; so that where a distress was made, and notice given on the 12th of May, the Court held that, on the evening of the 17th, the five days had expired, and that a removal and sale was then regular; (e) but the full five days must have expired, therefore, when goods had been taken on the 1st of March, at two o'clock, a sale before that hour on the fifth day, was irregular. (f) It is not, however, imperative upon the landlord to sell immediately upon the expiration of the five days; such time as a jury may think reasonable will be allowed him for the purpose of appraising and selling. (g) During such reasonable time, the goods distrained are *in custodia legis*, and are protected from seizure under an execution. (h) The mere fact of the landlord's not selling within the five days, in consequence of an arrangement between him and his tenant,

(a) *Walter v. Rumball*, 1 Salk. 247. S. C. Ld. Raym. 53. 4 Mod. 385, 390. 12 Mod. 76.

(b) *Moss v. Gallimore*, Dougl. 279.

(c) *Walter v. Rumball*, *ib. sup.*

(d) Stat. 11 Geo. II. c. 19, s. 8. *Owen v. Legh*, 3 B. & A. 470, *et vide supra*.

(e) *Wallace v. King*, 1 H. Bl. 13.

(f) *Per Tindal, C. J., Harper v. Taswell*, 6 C. & P. 166.

(g) *Pitt v. Shew*, 4 B. & A. 208.

(h) *Bac. Abr. Execution. C. 4. Harrison v. Barry*, 7 Price, 690. *Gilb. Dist. 44.*

is not sufficient proof of collusion. (i) And it has been held that the request of the tenant will justify the landlord in detaining the goods of a lodger upon the premises, beyond the proper time of selling, if the landlord did not know which were the goods of the lodger, and which those of the tenant. (k)

The two appraisers (who must be persons having no interest, and should not be the broker or party distraining,) (l) should then be sworn by the sheriff or under-sheriff of the county, or constable of the parish where it is taken (m) before the appraisement is made: (n) and the constable should be present when the appraisement is made, and the appraisers must not be sworn by the constable of an adjoining parish, although the proper constable cannot be found. (o) Goods, therefore, distrained in the parish of A. cannot be appraised by appraisers sworn before the constable of the parish of B. (p) It seems to be unnecessary that the sheriff or constable should be present at the sale; but the appraisers being regularly sworn, may, with the distrainor, proceed to sell. (q)

Appraisers
must be
sworn.

By whom.

By statute 57 Geo. III. c. 93, entitled "an act to regulate the costs of distresses levied for payment of small rents," it is enacted, that no person whatsoever making any distress for rent, where the sum demanded and due shall not exceed the sum of twenty pounds for and in respect of such rent, nor any person whatsoever employed in any manner in making such distress, or doing any act whatsoever in the course of such distress, or for carrying the same into effect, shall have, take, or receive out of the produce of the goods or chattels distrained upon and sold, or from the tenant, landlord, or from any other

Costs of dis-
tress for small
rents.

(i) *Bac. Abr. Execon. C. 4. Harrison v. Barry*, 7 Price, 690.

(k) *Fisher v. Algar*, 2 C. & P. 374.

(l) *Andrews v. Russell*, Bull. N. P. 81, 7 edit. *Lyon v. Weldon*, 9 Moore, 629. 2 Bing. 334. *Westwood v. Cowne*, 1 Str. 172.

(m) *Avenell v. Croker*, 1 Moo. & Malk. 172.

(n) *Kenney v. May*, 1 Moo. & Rob. 56.

(o) *Ibid.*

(p) *Vide Wallace v. King, supra.*

(q) 4 Mod. 391. *Com. Dig. Distress*, (D 8.).

person whatsoever, any other or more costs and charges for and in respect of such distress, or any matter or thing done therein than as follows ; levying distress, 3*s.* ; man in possession, per day, 2*s.* 6*d.* ; appraisement, whether by one broker or more, 6*d.* in the pound on the value of the goods ; stamp the lawful amount thereof ; all expense of advertisements (if any such) 10*s.* : catalogues, sale and commission, and delivery of goods, 1*s.* in the pound on the net produce of the sale : and no person whatsoever shall make any charge whatsoever for any act, matter, or thing as above, unless such act shall have been really done. The second section provides, that the party aggrieved may apply to a justice of the peace, who may adjudge treble the amount of money unlawfully taken, to be paid by the offender to the party aggrieved, with full costs leviable by distress, and if no sufficient distress, to be punishable by imprisonment until the order is satisfied. By the next section it is provided, that if the complaint is unfounded, the justice may give costs to the party complained against, not exceeding 20*s.* Provided, that the landlord shall only be liable under the act in cases in which he shall have personally levied the distress. And parties shall not be barred of any legal remedies they might have had before the passing of the act, except so far as any complaint shall have been determined by the order and judgment of the justice before whom it shall have been brought. (*u*)

By the same statute in all cases, whether the sum distrained for shall or shall not exceed 20*l.*, the person levying the distress is required to give a copy of all his charges and costs, signed by him to the person on whose goods the distress shall be levied ; (*v*) but if the landlord does not personally interfere he will not be liable for the omission of the broker to give the copy. (*w*)

In a case within this statute, it has been decided, that after a distress made by a broker, the rent and charges may be

(*u*) Sect. 4.
(*v*) Sect. 6.

(*w*) *Hart v. Leach*, 1 *Mees. & W.* 560, and 1 *Tyr. & Gr.* 1010.

tendered to the landlord, and that a subsequent detainer is wrongful. (*x*)

If the distress exceeds 20*l.* it is not within the statute, except as provided in section 6, nor will the restriction as to costs in 1 & 2 Philip & Mary, c. 12, apply to cases of levying a distress and impounding on the premises, as authorized by the 11 Geo. II. c. 19. (*y*)

The expression used in the statute of the 57 Geo. III. "whether by one broker or more," has led to the question, whether, if the rent distrained for is under 20*l.*, one appraiser will not be sufficient, *Lyndhurst*, C. B., expressed an opinion in the affirmative; (*z*) but a doubt appears thrown on the point by a subsequent case before *Tindal*, C. J. (*a*)

By the common law, if there was sufficient property upon the premises, and the landlord neglected to take sufficient distress, he could not again resort to the tenant's property to make up any deficiency in the first distress. (*b*) But by the statute, 17 Car. II. c. 7, s. 4, (*c*) it is enacted, that where the value of the cattle distrained shall not be found to be of the full value of the arrears distrained for, the party to whom such arrears are due, his executors or administrators, may distrain again for the arrears.

When a second distress may be taken.

And where rent is due at several days, the taking of a distress on one day for the one rent will be no bar to the taking of another on another day; (*d*) nor does it matter whether the first distress be taken for the rent which last became due. (*e*) Where cattle taken and impounded as a

(*x*) *Smith v. Goodwin*, 4 B. & Ad. 413. 1 Nev. & M. 374, *et vide* *Moffatt v. Parsons*, 5 Taunt. 307.

(*y*) *Child v. Chamberlain*, 3 Nev. & M. 520. 6 C. & P. 213.

(*z*) *Fletcher v. Saunders* and another, 6 C. & P. 747.

(*a*) *Bishop v. Bryant* and an-

other, *ibid.* 484.

(*b*) *Anon. Moore*, 7. *Anon. Cro. Eliz.* 13. *Wallis v. Savill*, Lutw. 1536.

(*c*) Extended to counties palatine, 19 Car. II. c. 5.

(*d*) *Anon. Moore*, 7.

(*e*) *Pamer v. Stabick*, 1 Sid. 44.

Landlord liable for excessive or irregular distress.

distress die, without any fault or neglect in the distrainor, he may lawfully take another distress; (f) but while, for his own remuneration, the landlord should be careful to take sufficient distress, he must take care that his distress is not excessive : which, as well as any irregularity in his distraining, will subject him to the action of his tenant, as will be shewn when treating of the remedies of the tenant against the lord.

The landlord's remedy when the tenant's goods are fraudulently removed.
11 Geo. II. c. 19.

In order to prevent the landlord's being deprived of his distress by a clandestine and fraudulent removal of the tenant's goods from the premises demised, it is enacted, by the statute 11 Geo. II. c. 19, that "in case any tenant or lessee for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is reserved, shall *fraudulently* or clandestinely convey away or carry off, or from such premises, his goods or chattels, to prevent the landlord distraining the same for arrears of rent so reserved, it shall be lawful for every landlord, or any person by him for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away or carrying off such goods and chattels, to take and seize such goods and chattels wherever the same shall be found as a distress for the said arrears of rent; and the same to sell, or otherwise dispose of, in such manner as if the said goods and chattels had actually been distrained by such landlord, in and upon such premises for such arrears of rent."

In reference to this clause of the statute, it seems that a removal of cattle from the land, and placing them where not likely to be found, although in an open field, is a fraudulent removal within the statute. (g)

The statute then provides, "that no landlord or other

(f) Anon. Dyer, 280. b. pl. 14. Mod. 21. 12 Mod. 658.
Vasper v. Eddowes, Ld. Raym. 720. (g) Stanley v. Wharton, 9 Price,
S. C. Salk. 248. Holt, 256. 11 301.

person entitled to such arrears of rent, shall take or seize any such goods or chattels as a distress for the same, which shall be sold *bonâ fide*, and for a valuable consideration before such seizure made, to any person not privy to such fraud as aforesaid." (d)

And in order to deter tenants from fraudulently carrying away their goods, and others from wilfully aiding or assisting therein, or concealing the same, the statute provides, that "if any such tenant or lessee shall fraudulently remove and convey away his or her goods as aforesaid, or if any person shall wilfully and knowingly aid or assist any such tenant or lessee in such fraudulent conveying away or carrying off of any part of his or her goods or chattels, or in concealing the same, every person so offending, shall forfeit and pay to the landlord, from whose estate such goods and chattels were fraudulently carried off as aforesaid, double the value of the goods by him carried off or concealed as aforesaid; to be recovered by action of debt in any of his majesty's courts of record at Westminster, or in the courts of session in the counties palatine of Chester, Lancaster, or Durham, respectively, wherein no essoin, protection, or wager of law, shall be allowed, nor more than one imparlance." (e).

Fraudulent removal.

"Provided always, that where the goods and chattels so fraudulently carried off or concealed shall not exceed the value of 50*l*. it shall be lawful for the landlord, from whose estate such goods or chattels were removed, his bailiff, servant or agent, in his behalf, to exhibit a complaint in writing against such offender before two or more justices of the peace of the same county, riding, or division of such county, residing near the place whence such goods and chattels were removed, or near the place where the same were found, not being interested in the lands or tenements whence such goods were removed; who may summon the parties concerned,

Summary remedy before two magistrates.

(d) Sect. 2.

(e) Sect. 3.

examine the facts, and all proper witnesses upon oath, or if any such witness be one of the people called Quakers, upon affirmation required by law; and in a summary way determine, whether such person be guilty of the offence with which he is charged; and to inquire in like manner of the value of the goods and chattels by him so fraudulently carried off or concealed as aforesaid; and upon full proof of the offence, by order under their hands and seals, the said justices may and shall adjudge the offender to pay double the value of the said goods and chattels to such landlord, his bailiff, servant, or agent, at such time as the said justices shall appoint: and in case the offender having notice of such order, shall refuse or neglect so to do, may and shall, by warrant under their hands and seals, levy the same by distress and sale of the goods and chattels of the offender, and for want of such distress, may commit the offender to the house of correction, there to be kept to hard labour, without bail or mainprize, for the space of six months, unless the money so ordered to be paid as aforesaid shall be sooner satisfied."

Appeal to the
Quarter
Sessions.

" Provided always, that it shall be lawful for any person who thinks himself aggrieved by such order of the said two justices, to appeal to the justices at their next quarter sessions for the same county, who may and shall hear and determine such appeal, and give such costs to either party as they shall think reasonable, whose determination therein shall be final."

" Provided also, that where the party appealing shall enter into a recognizance with one or two sufficient surety or sureties, in double the sum so ordered to be paid, with condition to appear at such quarter sessions, the order of the said two justices shall not be executed against him in the mean time." (*f*)

(*f*) Sect. 4, 5, 6.

On this branch of the statute it is held not to be *compulsory* on the landlord to have recourse to the summary remedy before the two justices, although the goods are under 50*l.* (*g*) The justices must, in their order on conviction, make it *appear* that the party removing was tenant, and the fact cannot be supplied by intendment. (*h*) They may adjudicate on an information for a fraudulent removal, although it appears that the property on the premises is disputed, and the tenant has paid the rent to one of the claimants. (*i*)

The statute then provides, that "where any goods or chattels fraudulently or clandestinely conveyed or carried away by any tenant, his servant, agent, or other person aiding or assisting therein, shall be put, placed, or kept in any house, barn, stable, outhouse, yard, close, or place, locked up, fastened, or otherwise secured, so as to prevent such goods or chattels from being taken and seized as a distress for arrears and rent, it shall be lawful for the landlord, his steward, bailiff, receiver, or other person empowered, to take and seize as a distress for rent, such goods and chattels (first calling to his assistance the constable, headborough, bors-holder, or other peace officer of the hundred, borough, parish, district, or place, where the same shall be suspected to be concealed, who are thereby required to aid and assist therein; and in case of a dwelling-house, oath being first made before some justice of the peace of a reasonable ground to suspect that such goods or chattels are therein) in the daytime to break open and enter into such house, barn, stable, out-house, yard, close, and place, and to take and seize such goods and chattels for the said arrears of rent, as he might have done by virtue of this or any former act, if such goods and chattels had been put in any open field or place." (*k*)

Doors may be broken to take goods, &c. removed and concealed.

It has been decided that the statute applies only to the goods of the tenant, and not to those of a stranger; and, therefore,

Construction of the Act.

(*g*) *Stanley v. Wharton, supra.*

(*i*) *Coster v. Wilson, 3 Mees. &*

(*h*) *Rex v. Davis, 2 Nev. & M. W. 411.*

349. 5 B. & Ad. 551.

(*k*) Sect. 7.

a plea not averring the fact of the goods being the property of the tenant, was held bad on demurrer. (*l*)

Where a creditor took possession of his debtor's goods, and removed them off the premises, with the debtor's assent, in liquidation of a *bond fide* debt, being fully aware of his debtor's insolvency, and apprehensive of the landlord's distraining, the Court held that the transaction was not within the statute, and that there was nothing illegal in the tenant's allowing a creditor thus to liquidate his debt. (*m*)

In an action against a *tenant* for fraudulently removing his goods to avoid a distress, it is not necessary to shew an actual participation in the act, if the removal takes place with his privity. (*n*) Where, however, the action is against a party *for aiding and assisting the tenant* in the fraudulent removal of his goods, with intent to prevent the landlord from distraining them, it is incumbent on the landlord to prove, not only that the defendant assisted the tenant in such fraudulent removal, but also that he was privy to the fraudulent *intent* of the tenant; and the statute, as it seems, is so far penal, that in an action by the landlord against *a third party*, for assisting the tenant in such fraudulent removal, it is necessary to bring the case by strict proof within the words of the first section. (*o*)

In a declaration on this statute to recover double the value of the goods removed, it was averred that 57*l.* was in arrear for rent: the notice of distress which had been produced at the trial alleged that 55*l.* was due; the Court held that the sum in arrear was perfectly immaterial, and that the notice of distress might have been abandoned (*p*)

(*l*) *Thornton v. Adams*, 5 M. & S. 38.

(*m*) *Bach v. Meats*, 5 M. & S. 200.

(*n*) *Lister v. Brown*, 3 D. & R. 501.

(*o*) *Brooke v. Noakes*, 8 B. & C. 537. *Sed vide Stanley v. Wharton*, 9 Price, 301.

(*p*) *Gwinnet v. Phillips*, 3 T. R. 643.

We have seen the statute does not extend to the goods of a stranger ; and, therefore, if the tenancy has determined by a conveyance away of the reversion by the landlord, he will not, it seems, be enabled to follow the goods removed after the tenancy has expired. (s)

The section [4] which gives a summary remedy before two magistrates, provided the value of the goods shall not exceed 20*l.*, does not take away the jurisdiction of the superior Courts, but the party has his election either summarily to proceed, or to bring an action upon the statute ; and the fact of his having in the first instance made his complaint before a magistrate, will not preclude him from afterwards maintaining such action. (t)

If the landlord elect to proceed in a summary way, justices either of the county from which the goods were removed, or of that in which they are concealed, may convict the offenders in their respective counties. (u)

(s) *Ashmore v. Hardy*, 7 C. & P. 501.

169. S. C. Holt's N. P. C. 147.

Stanley v. Wharton, 9 Price, 301.

(t) *Horsefall v. Davy*, 1 Stark.

(u) *Rex v. Morgan*, 1 Cald. 156.

SECTION II.

OF THE ACTION OF DEBT FOR RENT.

Debt for rent,
when main-
tainable:

Another remedy which the law has especially provided to the landlord for the recovery of his rent, is the action of debt.

By the 3 & 4 Wm. IV. c. 42, actions of debt for rent on an indenture of demise, are restricted to ten years after the end of the session, or within twenty years after the cause of such action or suit. (*v*)

At common law, debt lay for the rent of lands demised for life, (*w*) for years, (*x*) or at will. (*y*) But with this distinction;—that upon a lease for years, or at will, it lay as soon as it became in arrear: but upon a freehold lease, debt was not maintainable until after the lease were determined, either by the death of the party for whose life it was granted, (*z*) or by the surrender of the lessee, (*a*) or by the lessor's putting an end to the lease by entering for a forfeiture, (*b*) or recovering the lands in an action of waste: (*c*) which distinction arose from the action of debt lying only upon a contract; and it

(*v*) Sec. 3, *et vide* Paget *v.* Foley, 2 Bing. 679. N. S. *et vide supra*, p. 425.

(*w*) Co. Lit. 162. *a*.

(*x*) Lit. s. 58.

(*y*) Lit. s. 72.

(*z*) Co. Lit. 162. *a*. 1 Rol. Abr.

596. l. 17. Bishop of Winchester *v.* Wright, Ld. Raym. 1056.

(*a*) Ognel's case, 4 Rep. 49. *a*. Anon. 4 Leon. 7.

(*b*) Rol. Abr. 596. l. 23, 34, &c.

(*c*) *Ibid.* l. 34.

was said that when the freehold was determined it was changed into a contract; and that, therefore, as soon as the estate was at an end, debt lay for the arrears previously due. (*d*) Debt also lay upon the lease of an incorporeal hereditament, as an advowson, common, tithes, market, &c. : not that any rent could issue out of these, but it enured merely as a contract. (*e*) And by this remedy every kind of rent was recoverable; whether it were money or corn, or other thing reserved by the lease. (*f*)

The statute, 8 Anne, c. 14. s. 4, has now put freehold leases upon the same footing as leases for years or at will, by enacting, "that it shall be lawful for any person having any rent in arrear or due upon any lease or demise for life or lives, to bring an action or actions of debt for such arrears of rent in the same manner as they might have done in case such rent were due and reserved upon a lease for years." 8 Ann. c. 14.

The action of debt for rent is founded on a privity of contract, which is said to be annexed to the *person*, in respect of the *estate*, and to follow the estate. As soon, therefore, as the privity of estate is transferred, the remedy by debt is transferred also. Thus, if the lessor grant his reversion to A. the remedy by debt is gone from him, (*g*) and follows the reversion to the grantee, with whom it remains as long as the reversion; for if he assign it, then the remedy by debt passes with the reversion to his assignee. (*h*) So after the lessor's death, debt lies by his heir, (*i*) or devisee, for arrears due after the testator's death. (*k*) And if only part of the

So long only
as privity of
estate subsists.

(*d*) 1 Rol. Abr. 596. l. 17.

(*e*) Co. Lit. 47. a.

(*f*) Denny v. Parnell, 1 Rol. Abr. 591. l. 28. Cheney's case, 3 Leon. 260. Anon. 4 Leon. 46.

(*g*) Walker's case, 3 Rep. 22. b. 23. a.

(*h*) Humble v. Oliver, Poph. 55.

S. C. Cro. Eliz. 328. Overton v. Sydal, *ibid.* 555.

(*i*) Year Book, 5 Hen. VII. 19. a. 1 Rol. Abr. 591. l. 46.

(*k*) *Supra.*

reversion be assigned, debt lies by the assignee for his proportion. (n) In like manner debt lies by the lord who has the reversion by escheat. (o) And if a reversion is granted in mortmain, debt lies for the rent by the lord who entered for the alienation in mortmain. (p)

But sometimes debt lies, though the plaintiff has no reversion at the time of action brought. As, if a man lease for years, and rent become due, and a stranger recover the land against the lessor, the lessor may still maintain debt against his lessee for the arrears of rent. (q) So also, if the lessee assign his whole term to B., and leave himself no reversion, debt will nevertheless lie by him against B. or the assignee of B. (r) And where the lessor assigns his rent without the reversion, the assignee may maintain debt for the rent, because the *privity of contract* is transferred. (s)

Attornment im-
material.

At common law, however, in order to give the assignee of the reversion or of the rent, an action of debt against the lessee, it was necessary that the lessee should have attorned, and so have recognised the change of person to whom the rent was due. (t)

An attornment at the common law was the assent of the tenant to a grant of the seignory, or of a rent: or of the donee in tail, or tenant for life or years, to a grant of a reversion or remainder made to another; (u) the attornment being necessary to the perfection of the grant. And though the necessity of attornment was in some measure avoided by

(n) *Broom v. Hore*, Cro. Eliz. 174.

633. *Ards v. Watkin*, *ibid.* 637, 651.

(o) *Walker's case*, 3 Rep. 23. a.

(p) *Year Book*, 5 Hen. VII. 19. a.

(q) *Br. Abr. Ditto*, 93.

(r) *Newcomb v. Harvey*, Carth.

161. *Loyd v. Langford*, 2 Mod.

(s) *Marle v. Flake*, 3 Salk. 118.

Knowles's case, Dyer, 56. *Robins v. Cox*, 1 Lev. 32. *Allen v. Bryan*, 5 B. & C. 512.

(t) *Co. Lit.* 309. a.

(u) *Ibid.*

the statute of uses, (v) by which the possession was immediately executed to the use; (w) and the statute of wills, by which the legal estate is immediately vested in the devisee; (x) attornment still continued to be necessary in many cases. (y) But both the necessity and efficacy of attornments were almost totally taken away by the statutes 4 Anne. c. 16, s. 9. 4 Ann. c. 16. 10, and 11 Geo. II. c. 19, s. 11. By the former of which it was enacted, "that all grants or conveyances of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual without any attornment of the tenants of any such manors, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall be expectant or depending, as if their attornment had been had and made; provided that no such tenant shall be prejudiced or damaged by payment of any rent to the grantor or conusor, or by breach of any condition for non-payment of rent before notice shall be given to him of such grant by the conusee or grantee." And by the latter statute it was enacted, "that the attornments of tenants to strangers claiming title to the estate of their landlords shall be absolutely null and void to all intents and purposes whatever, and that the possession of their respective landlords shall not be deemed or construed to be in any wise changed, altered, or affected by any such attornment; provided that nothing therein contained should extend to vacate, or affect any attornment made pursuant to and in consequence of some judgment at law, or decree or order of a court of equity, or made with the privity or consent of the landlord or landlords, lessor or lessors, or to any mortgagee after the mortgage is become forfeited." The one statute having made attornment unnecessary, and the other having made it inoperative, it is now of course useless to aver it in pleading. (z)

(v) 27 Hen. VIII. c. 10.

(y) *Vide* 1 Williams's Saund. 234,(w) *Birch v. Wright*, 1 T. R. 384, n. (4.)(z) *Moss v. Gallimore*, Doug. 883.

(x) 32 Hen. VIII. c. 1.

1 Wms. Saund. 235. (b.)

By whom
maintainable,
the heir or ex-
ecutor of the
lessor.

32 Hen. VIII.
c. 37.

Against whom
maintainable;
the lessee;

the assignee;

Where a man died seised of a rent-service, rent-charge, rent-seck, or fee-farm rent, either in fee, in tail, or *pur autre vie*, neither his heir nor personal representative could maintain debt for the arrears incurred in his lifetime; (b) although for arrears of a rent of which a party was seised for his own life, debt lay by his executor; because the estate was determined by his life. (c) By the statute of the 32 Hen. VIII. c. 37, a double remedy was, however, given by action of debt or distress to the executor for arrears of all such rents incurred in the testator's life, so long as the lands out of which the rents issue remain in the seisin or possession of the under-tenants who ought to have paid the same, or of any other person claiming such lands by and from the under-tenants by purchase, gift, or descent.

The lessee, his executors and administrators, remain liable to an action of debt by the lessor or his assignee as long as the term continues. (d) The privity of estate we have seen the lessor may transfer, and thereby destroy his right to maintain debt against the lessee. (e) But by his own act the lessee cannot discharge himself. (f) If, therefore, the lessee assign the term, he or his executor still remains liable to an action of debt for the rent; (g) unless, indeed, the lessor accept rent from the assignee, and so recognize him as his tenant; by which the lessee will be released from the action of debt, although he will still remain liable to the action on the covenants. (h) In like manner, though the executor assign the term, he still remains liable to an action of debt. (i)

If the lessee assign, the lessor may have debt for ar-

(b) Co. Lit. 162. a.

(c) *Vide supra*, p. 490.

(d) Rushden's case, Dyer, 4. b.

(e) *Supra*, p. 491.

(f) Walker's case, 3 Rep. 23, 24.

Coghill v. Freelove, 2 Vent. 209.

Hellier v. Casebert, 1 Sid. 266. S. C.

1 Lev. 127.

(g) Walker's case, *sup.*

(h) Devereux v. Barlow, 2 Saund. 181.

(i) Lord Rich v. Frank, 1 Bulstr.

2. Howse v. Webster, Yelv. 103.

Hellier v. Casebert, *supra*.

rents accruing due after the assignment against the assignee or the lessee at his election. (*k*) And where the lessee assigns part of his estate, debt lies against the assignee *pro tanto*, and against the lessee for the residue. (*l*)

If, however, the lessee of a term or his executor assign, and the lessor accept the whole or any part of the rent of such assigned estate from the assignee, or in any other manner recognize the assignee as his tenant, his remedy by debt, as before observed, against the lessee or executor is gone. Upon which principle it was decided that after the commissioners' assignment, debt would not lie against a bankrupt upon the *red-dendum* in a lease for rent accruing after the assignment, because the lessor's assent was virtually included in the statute authorizing such assignment. (*m*)

If the lessee assign his whole term to the lessor, rendering rent, debt does not lie against the executor of the lessor for the rent, because such assignment amounts to a surrender; and therefore, after the lessor's death the only remedy against his executor is in equity. (*n*)

Debt lies against the assignee only so long as he remains possessed of the term. For if he assign it, his liability, which arises solely from the privity of estate, is destroyed, even though he assign it to a beggar. (*o*)

Although the lessor may distrain on the assignee of part of the land for the whole of the rent, it would seem that he cannot have debt for the whole of the rent against such an assignee. The point has not been expressly decided, but

(*k*) *Gamon v. Vernon*, 2 Lev. 231.
S. C. Sir T. Jones, 164.

(*l*) *Walker's case*, 3 Rep. 24. *b.*
Marrow v. Turpin, Cro. Eliz. 715.
S. C. Moore, 600. *March v. Brace*,
2 Bulstr. 151. S. C. Cro. Jac. 334.
Per Ld. Kenyon, in *Auriol v. Mills*,
4 T. R. 98.

(*m*) *Wadham v. Marlow*, 8 East,
314. And see 6 Geo. IV. c. 16,
s. 75.

(*n*) *Loyd v. Langford*, 2 Mod. 174.

(*o*) *Tongue v. Pitcher*, 3 Lev. 295.
S. C. 2 Vent. 234. 4 Mod. 71. 1
Show. 340. 1 Salk. 81. *Carth.*
177. *Lekeux v. Nash*, Sir. 1221.

such appears to have been the inclination of the opinion of the Court in a recent case, which went off on the pleadings. In that case the plaintiff averred that *all* the estate on the premises had vested in the defendant, which the latter traversed, and issue being joined, the verdict was entered for the defendant. (*p*)

the heir;

After the ancestor's death, debt lies against the heir in respect of assets by descent, for arrears of rent due in the ancestor's life. (*q*) But for more he cannot be charged. For if the lease were for the ancestor's life, his death puts an end to the estate; and if it is granted to the lessee, *per autre vie*, without mention of his heirs, (*r*) and the lessee die, living *cestui que vie*, or if for a term of years, and he die before the expiration of the term; the estate in either case passes to the executor, who becomes chargeable in respect thereof.

or executor;

husband and wife.

Where a lease is made to a feme sole, who afterwards marries, and rent becomes due, after which the term expires, and the wife dies, debt lies against the husband for such rent, for he is chargeable after the wife's death in respect of the perception of the profits by himself. (*s*)

When the action should be in the *debet*,

Where the lessor or his assignee brings debt against the lessee or his assignee, the action should be both in the *debet* and *detinet*. (*t*)

and when in the *detinet*.

Where the action is *by* the executor or administrator of the lessor or the grantee of the reversion, for rent due either in the testator or intestate's lifetime, or since his death, it must be in the *detinet* only. (*u*) So debt *against*

(*p*) *Curtis v. Spitty*, 1 Bing. 756 N. S., *et vide* Chitt. on Pleading, Vol. II. p. 280, 6 edit.

(*q*) *Supra*, p. 335.

(*r*) See 2 Blac. Com. 258.

(*s*) *Vane v. Minshall*, 1 Lev. 25. Lev. 250. S. C. 1 Sid. 224, 379.

(*t*) Com. Dig. *Pleader*, (2 W. 8.)

(*u*) *Hargrave's case*, 5 Rep. 31.

b. S. C. (*Body v. Hargrave*), Cro. Eliz. 712. *Spark v. Spark*, Cro. Eliz. 840. *Smith v. Norfolk*, Cro. Car. 225. *Frevin v. Paynton*, 1

the executor or administrator for rent due in the testator's lifetime, or for rent due since his death *where the executor has not entered*, shall be in the *detinet* only, and the judgment will be against the assets *de bonis testatoris*. (w) But if the executor or administrator enter, then he becomes chargeable for rent incurred after the death, as assignee, in respect of the perception of the profits: and the action should be in the *debet and detinet*, and the judgment will be *de bonis propriis*. (x) In respect of the action of debt against the executor or administrator for rent arrear, the result of the cases is stated in 1 *Wms. Saunders*, (y) as follows. "If an executor be sued in his representative capacity for rent accruing in his own time, either in debt or covenant, where the lease is by deed, or in debt or assumpsit for use and occupation, where the lease is not by deed, he may plead *plene administravit*, and under that plea may show that the land yields *no profit*, and that he has *no assets aliunde*; but if the land yields a profit equal to the rent, he will fail on a plea of *plene administravit*, for he is bound to apply the profits of the land towards payment of the rent in the first instance, and his not doing so will be a *devastavit*; if, therefore, the land yields some profit, but less than the rent, it should seem that his plea should be *plene administravit præter* the profit. If, on the other hand, the executor be sued as he may be when he enters, and is in the actual occupation, in his individual capacity as assignee of the term, in debt on a lease by deed, he must plead specially that he holds only as executor, that the land yields no profit or less than the rent, and pray whether he shall be charged otherwise than in the *detinet*. In covenant he must plead the same matter specially.

(w) *Hellier v. Casebert*, 1 Lev. 127. *Jevens v. Harridge*, 1 Saund. 1. n. (1.)

(x) *Hargrave's case*, *ub. sup.*—*Bailiff, &c. of Ipswich v. Martyn*, Cro. Jac. 411. *Caly v. Joslin*,

Aleyn, 4. *Lord Rich v. Frank*, 1 Bulstr. 22. S. C. Cro. Jac. 238. *Sackville v. Evans*, Freem. 171. *Jevens v. Harridge*, 1 Saund. 1. *Buckley v. Pirk*, 1 Salk. 317.

(y) P. 112. (n.) c. 5 Edit.

In accordance with this statement of the law, is the recent case of *Rubery v. Stevens*. This was an action by the reversioner against the executors, as *assignees* of a term demised by indenture at a rent of £26.; the defendants pleaded that they ought not to be charged otherwise than as executors in the *detinet* only. “And the defendants further say, that the said demised premises at the time of the death of the said P. W. were, and from thence hitherto have been, and still are, of much less yearly value than the value of the said rent of £26 a-year, so by the indenture reserved as aforesaid, that is to say, the same premises during all the time aforesaid, were, and still are of no value whatever. The plea concluded with a *plene administravit*. The replication was, that the premises were, and still are, of the yearly value of £26., on which issue was joined. At the trial the jury found the premises to be of the annual value of £20.; and it was held that the plaintiff might recover the arrears of rent, at the rate fixed by the jury. (y)

In a subsequent case, (z) against executors for use and occupation, it appeared that only one of the executors had entered, and the court gave judgment that the entry of one did not enure to make the other liable for use and occupation. The Court said, “we think the other executor is not liable at all in this form of action; but we do not say, whether he might, or might not be liable with his co-executor, in their own right, even without entry by either, in an action of debt for rent accruing after the testator's death, as the term vested in both by operation of law, for after accepting the executorship neither of them could waive the term. And if the testator holds under a demise for a year certain, and so on from year to year determinable on notice, and subject to the covenants, &c., and the executors enter and occupy, and pay rent, they will be chargeable *de bonis propriis* upon the terms contained in the original demise. (a)

(y) 4 B. & Ad. 245. 1 Nev. & 1 Cr., M. & R. 172. 4 Tyr. 561. M. 182.

(a) *Buckworth v. Simpson* and

(z) *Nation v. Tozer* and another, another, 1 Cr., M. & R. 834.

If the plaintiff in the same action charge the defendant in the *detinet*, for rent due in the lifetime of the testator or intestate, and in the *debet and detinet* for rent due in his own time, the declaration will be bad on special demurrer. (b) And so if the plaintiff charge an executor in the *debet and detinet* where he ought to have charged him in the *detinet* only; (c) though after verdict it will be helped by the statute of jeofails. (d) But in all cases where a party may be charged both in the *debet and detinet*, the plaintiff may, if he please, charge him in the *detinet* only, (e) it being always competent to a man to abridge his demand. (f) But in so doing as against an executor, he also abridges his remedy, the judgment being only *de bonis testatoris*, and not against the executor's own property. (g) Debt by and against an heir should be in the *debet and detinet*, because he comes in after the ancestor in his own right, and not in a mere representative character. (h)

By the 3 & 4 Wm. IV. c. 42, s. 23, it is provided, that an action of debt on simple contract shall be maintainable in any court of common law against any executor or administrator.

3 & 4 Wm. IV.
c. 42, s. 23.

The venue in the action of debt is regulated according as the action is brought upon an express privity of contract, or in respect of the privity of estate. Wherever the action lies upon the privity of contract, it is transitory, and the venue may be laid in any county. Where the action lies in respect of the privity of estate, it is local, and must be laid in the county in which the land is situate. (i) Therefore, debt by

The venue.

(b) *Salter v. Cobbold*, 3 Lev. 74.
Burland v. Tyley, Ld. Raym. 1391.
S. C. 8 Mod. 356.

(c) *Reynell v. Langcastle*, Cro. Jac. 546.

(d) 16 & 17 Car. II. c. 8. *Fruen v. Porter*, 1 Sid. 379. 4 & 5 Ann. c. 16, *et vide* 9 Geo. IV. c. 15.

(e) *Royston v. Cordrye*, Aleyn, 42. *Boulton v. Canon*, Freem. 337. *Hope v. Bague*, 3 East, 2.

(f) *Wilson v. Hobday*, 4 M. & S. 120.

(g) *Royston v. Cordrye*, Aleyn, 43.

(h) Com. Dig. *Pleader*. (2 E. 1.) *Walcot's case*, 5 Rep. 36. *b. Goodwin v. Newton*, 1 Lev. 130. *Bowyn v. Rivit*, Sir W. Jones, 87. *Bur and v. Tyler*, Ld. Raym. 1391.

(i) *Matthew's case*, Cro. Eliz. 565. *Way v. Yally*, 2 Salk. 651.

the lessor against the lessee, (*k*) and by the lessor against the executor for rent due in the lessee's time, (*l*) being founded upon the privity of contract, may be brought in any county. On the other hand, debt by the lessor against the assignee, (*m*) or by the lessor against the executor for rent due in his own time, (*n*) which is founded merely upon the privity of estate, (*o*) must be brought in the county in which the lands lie. And so of debt by the grantee of the reversion against the lessee, (*p*) or his assignee, the *rent* following the reversion in respect of the *privity of estate*. (*q*) For though the statute 32 Hen. VIII. c. 34, transfers the *covenants* running with the land to the grantee, and as to them gives him an action in respect of the privity of contract; and though the words of the statute appear sufficiently large to put the grantee in the very same situation as the grantor; yet if the grantee bring *debt* for rent, it must be in respect of the privity of estate. (*r*)

So debt by the executor or administrator of tenant in fee tail, or for life, of rents under the statute 32 Hen. VIII. c. 37, is local, and must be brought where the land lies. (*s*) A mistake in the venue is matter of substance, and may be taken advantage of by general demurrer, (*t*) but if the parcels are not set out in the declaration, the defendant must *crave oyer*, and set out the indenture, if there be one, or if none, must shew by averment where the land lies, before he can demur. (*u*) Where the action is local, and brought and tried in a wrong county, the defendant is aided after verdict by stat. 16 and 17 Car. II. c. 8. (*v*)

(*k*) *Ibid.* Dyer, 40. *a.* Patterson v. Scott, Str. 776.

(*l*) Bolton v. Cannon, 1 Ventr. 271. Cormel v. Lisset, 2 Lev. 80.

(*m*) Patterson v. Scott, Str. 776.

(*n*) Bolton v. Cannon, 1 Ventr. 271. Cormel v. Lisset, 2 Lev. 80.

(*o*) Tovey v. Pitcher, Carth. 177. Taylor v. Shum, 1 B. & P. 23.

(*p*) Trahearne v. Cleabrooke, Sir W. Jones, 43. Bond v. Cudmore, Cro. Car. 183. Thrale v. Cornwall, 1 Wils. 165.

(*q*) Barker v. Damer, Carth. 83.

(*r*) Thursby v. Plant, 1 Saund. 239, 240. Thrale v. Cornwall, 1 Wils. 165.

(*s*) Bull. N. P. 177. *a.*

(*t*) Cormel v. Lisset, 2 Lev. 80. Thrale v. Cornwall, 1 Wils. 165.

(*u*) 1 Saund. 241. *d.* note (*u*).

(*v*) Mayor of London v. Cole, 7 T. R. 583. Bailiffs of Lichfield v. Slater, Willes, 431.

Though the rent of lands be reserved by deed, it is unnecessary in an action of debt to set out or recite the deed in the declaration, because the deed is not the very gist of the action, but merely inducement; and, therefore, it is sufficient to state generally that the lessor demised the premises for a certain term. (*w*) But this mode of declaring lets in the defendant to plead *nil habuit in tenementis*, which he will be estopped from doing, provided the lessor by his declaration shews that the lease was by deed. (*x*) And in debt for rent payable on a lease of tithes or other incorporeal hereditaments the deed must be set out; because these lying merely in grant cannot be leased without deed. (*y*) It was formerly held that where the declaration assumed to recite the important parts of the deed, and give the particulars of the demise, any variance in substance would be fatal; (*z*) as where the lease reserved a rent of 15*l. per annum*, and three fowls, and the declaration stated the rent to be 15*l.* but omitted to mention the three fowls. (*a*) But this is in a great degree remedied by the recent statute of the 9 Geo. IV. c. 15, as subsequently noticed. (*b*)

Averments in the declaration.

9 Geo. IV. c. 15.

It appears to have been held formerly that the declaration ought to shew the local situation of the lands demised; (*bb*) but the modern mode of declaring is not to set out the parcels, (*c*) and it should seem to be unnecessary; (*d*) the rent reserved, (*e*) and the period at which it became due, (*f*) must, however, be set forth; and any material variance herein was formerly held to be fatal. (*g*) If the plaintiff declare for part of the rent he must shew that the rest is satisfied, (*h*)

(*w*) *Warren v. Consett*, Lord Raym. 1503. *Duppa v. Mayo*, 1 Saund. 276. n. (1.) And see *Atty v. Parish*, 1 N. R. 109.

(*x*) 1 Saund. *sup.*

(*y*) *Dean and Chapter of Windsor v. Gover*, 2 Saund. 297. n. (1.)

(*z*) *Bristow v. Wright*, Dougl. 665, and n. [†138.]

(*a*) *Sands v. Ledger, Ld.* Raym. 792.

(*b*) *Vide infra*, p. 504.

(*bb*) *Buckland v. Otley*, Cro. Jac.

682. *Grobham v. Thornborough*, Hob. 82.

(*c*) 1 Saund. 241. *d.* note (*u*).

(*d*) *Davies v. Edwards*, 3 M. & S. 380.

(*e*) Com. Dig. *Pleader*. (2 W. 14.) *Parker v. Harris*, 1 Salk. 262.

(*f*) Com. Dig. *Pleader*. (2 W. 14.)

(*g*) *Sands v. Ledger, sup.* 9 Geo. IV. c. 15, *supra*.

(*h*) *Baylye v. Offord*, Cro. Car. 137. 1 Saund. 201. note (*a*).

but it is unnecessary to state the entry of the lessee into the lands, (i) except in the case of a lease at will, where the tenant is chargeable merely in respect of his occupation. (k) So in an action by the lessor it is sufficient to declare that he is possessed of the premises without shewing what estate he has : (l) but where the assignee is plaintiff, he must shew the assignment by which he took the estate; (m) and in debt by a remainder-man for rent reserved upon a lease by tenant for years under a power, the plaintiff must shew what authority the tenant for life had to make such lease. (n)

Debt for use
and occupa-
tion.

But the ancient form of proceeding in debt for rent has now given way to the modern and more convenient action of debt for use and occupation, which is wholly independent of the statute of the 11 Geo. II. c. 19, giving *assumpsit* for use and occupation. (o) In this form the defendant is merely charged in respect of his occupation; it having been held unnecessary to set forth any demise of the premises, or for what term, or at what rent, they were demised ; or how long the defendant occupied them ; or at what period, or for what space of time the sum claimed for the occupation became due. (p) This action is transitory, (q) and it is unnecessary to state the local situation of the premises. (r) All that need be stated is, that the defendant is indebted to the plaintiff for the use and occupation of certain premises of the plaintiff at the request of the defendant by him occupied for a long time. This brief mode of declaring seems to have been suggested by the case of *Bellasis v.*

(i) *Bellasis v. Burbrick*, Salk. 209. S. C. *Ld. Raym.* 170. *Williams v. Bosanquet*, 1 B. & B. 238.

(k) *Ibid.*

(l) *Parker v. Harris*, 4 Mod. 76. *Scilly v. Dailey*, 2 Salk. 562. *Gold v. Barnsley*, Cart. 30.

(m) *Ibid.*, *et vide* *Whitton v. Peacock*, 2 Bing. 411, N. S.

(n) *Sands v. Ledger*, *Ld. Raym.* 792.

(o) See *Egler v. Marsden*, 5 Taunt. 25, *et vide infra*.

(p) *Per* Le Blanc, J., in *King v. Fraser*, 6 East, 354.

(q) *Egler v. Marsden*, 5 Taunt. 25.

(r) *Ibid.* *King v. Fraser*, 6 East, 348. Chitty on Pleading, Vol. II. p. 36, 6th edit. Selwyn Nisi Prius. p. 608, 9th edit.

Burbrick, (s) and first to have been practised in a case of the Common Pleas; (t) and, being recognized and approved of in the King's Bench, (u) became the ordinary form of declaring in debt for rent. (v)

It was said by the Court in *King v. Fraser*, "that the inconvenience arising to the defendant from this general form of declaring might be obviated by the practice of calling for the particulars of the plaintiff's demand, by which the defendant might be truly informed where the lands lay." Afterwards in *Davies v. Edwards*, (w) which was an action of debt upon a demise of lands, not setting forth where the lands were situate, a particular was given for "40*l.* for two years' rent for premises at *Chepstow*; whereas it appeared in evidence by the indenture of demise that the lands were situate in the parish of *Mynydd-thus-loyn*; *Richards*, C. B., however, was of opinion that no misrepresentation being intended, and it not appearing that the defendants held any other premises so as to be misled by it, the particular was sufficient, inasmuch as it disclosed the subject matter of the action, which was the rent. A verdict being taken for the plaintiff, with liberty to the defendant to move, a rule was granted by the Court of King's Bench, which was afterwards discharged; and Lord *Ellenborough*, C. J., said, if the defendant could have shewn not only that he might have been, but that he had actually been surprised, there would have been some foundation for the argument. But here no deception whatever was practised, nor was the defendant misled. If he had gone to a judge's chambers, as it was competent for him to do, for farther particulars, and had stated that he held no other but these premises,—would it not have been useless to have granted to him a farther particular?

(s) 1 Salk. 209. *Ld. Raym.* 170.(v) For modern form see Chitty on Pleading, *supra*.(t) *Stroud v. Rogers*, 6 T. R. 63. n. (b).

(w) 3 M. & S. 380.

(u) *Wilkins v. Wingate*, 6 T. R. 62.

Though it is unnecessary to state the situation of the demised premises, yet it was held that if the plaintiff assumed to set it out, and described them as lying in a wrong parish, or in a parish which had no existence, the variance would be fatal: (*w*) but where the parish was described by its popular name, (as *Lambeth*, for *St. Mary Lambeth*,) by which description the defendant could not be misled, it would be immaterial. (*x*)

9 Geo. IV.
c. 15.

By the 9 Geo. IV. c. 15, it is now provided, that in cases where a variance shall appear between any written or printed evidence, and the recital on record, the Court may order the record to be amended on payment of costs.

An action of debt for use and occupation may be maintained by a corporation aggregate which cannot demise but by deed, for this action does not imply any *demise*. (*y*) But it was held that in such an action by a dean and chapter, where the name of the *present* dean was mentioned at the beginning of the declaration, and it was afterwards laid that the occupation was "by the permission of the *said dean* and chapter;" and it appeared in evidence that the defendant occupied only in the time and by the permission of a *former dean*, Lord *Ellenborough*, C. J., held this to be a fatal variance, and directed a nonsuit. And upon a motion for a new trial, the Court being equally divided upon this point, could make no order; and the nonsuit accordingly stood. (*z*)

It seems more than doubtful from a modern case, whether, after judgment by default in debt for use and occupation, a writ of inquiry is not necessary before signing final judgment. (*a*)

(*w*) *Wilson v. Clark*, 1 Esp. 273.
Guest v. Caumont, 3 Camp. 235.

(*x*) *Kirtland v. Pounsett*, 1 Taunt. 570. And see *Williams v. Burgess*, 3 Taunt. 127, and an anonymous case before Lee, C. J., there

cited.

(*y*) *Dean and Chapter of Rochester v. Pierce*, 1 Campb. 466.

(*z*) *Ibid.*

(*a*) *Arden v. Connell*, 5 B. & A. 885.

In an action of debt for double value, under the statute 4 Geo. II. c. 28, a notice to quit and demand of possession must be alleged in the declaration; in satisfaction of which allegation, proof of a *notice only* will be sufficient. (c) And so a notice by a receiver under the order of the Court of Chancery will be sufficient notice under the statute. (d)

Debt for
double value.

Where the plaintiff in debt for double value, after stating a demise to the defendant's wife, and her subsequent marriage to the defendant, alleged in the first count a notice to quit and demand of possession delivered to the defendant and his wife, and in the second count a notice to quit and demand of possession delivered to the wife previously to the marriage, the Court of Common Pleas held, that in order to support the second count, it was necessary to join the wife for conformity. (e)

Where the landlord declared in debt, 1. for the double value, and 2. for use and occupation; and the tenant pleaded *nil debet* to the first, and a tender of the single rent before action brought, to the second count, and paid the money into Court which the plaintiff took out before trial, and still proceeded: it was held, that this was no cause of nonsuit upon the ground of such acceptance of the single rent being a waiver of the plaintiff's right to proceed for the double value; but that the case ought to have gone to the jury, and that the plaintiff's going on with the action after taking the single rent out of Court, was evidence to shew that he did not mean to waive his claim for the double value, but to take the single rent *pro tanto*. (f)

In this action one tenant in common may recover double the value of his moiety, without joining his co-tenant. g)

(c) *Wilkinson v. Colley*, Burr. 175.
2694.

(f) *Ryal v. Rich*, 10 East, 48.

(d) *Ibid.*

(g) *Cutting v. Derby*, Bl. Rep.

(e) *Lake v. Smith*, 1 New Rep. 1077.

SECTION III.

BY ACTION OF ASSUMPSIT FOR USE AND OCCUPATION.

Action of as-
sumpsit,

The current of ancient authorities is against the action on the case for rent in respect of a lease for years. It was a matter savouring of the realty, for which debt was the proper remedy; and, therefore, they seem to have agreed that assumpsit would not lie, except in the case of an express promise made to pay the rent after the expiration of the term, in consideration of previous enjoyment, where no certain sum was agreed upon, and the plaintiff merely went upon his *quantum meruit* in consideration of the defendant's previous occupation. (*h*)

under the sta-
tute 11 Geo. II.
c. 19,

But all difficulties in the case of demises not under seal are now removed by the statute 11 Geo. II. c. 19, s. 14, by which it is enacted, "that it shall and may be lawful to and for the landlord or landlords, *where the agreement is not by deed*, to recover a reasonable satisfaction for the lands, tenements or hereditaments, held or occupied by the defendant or defendants, in an action on the case, *for the use and occupation of what was so held or enjoyed*: and if in evidence on the trial of such action any parol, demise, or any

(*h*) *Greene v. Harrington*, Hob. 284. S. C. Hutt. 34. *Reade v. Johnson*, Cro. Eliz. 242. S. C. 1 Leon. 155. *Symcock v. Payn*, Cro. Eliz. 786. *Clerk v. Palady*, *ibid.* 859. *Dartnal v. Morgan*, Cro. Jac. 598. *Slack v. Bowsal*, *ibid.* 668. *Brett v. Read*, Cro. Car. 343. S. C. Sir W. Jones, 329. *Acton v. Symon*,

Cro. Car. 414. S. C. Sir W. Jones, 364. *Munday v. Bailey*, Aleyn, 29. *Mason v. Weland*, Skin. 238, 242. *How v. Norton*, 1 Lev. 179. S. C. 1 Sid. 272. 2 Keb. 8. *Chapman v. Southwicke*, 1 Lev. 204. S. C. 1 Sid. 323. *Johnson v. May*, 3 Lev. 150. *Neck v. Gubb*, Rol. Abr. 7. l. 4. *White v. Shorte*, *ibid.*

agreement, (not being by deed,) whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not, therefore, be nonsuited, but may make use thereof as an evidence of the *quantum* of the damages to be recovered."

In this action, therefore, the landlord recovers "not the rent, but an equivalent for the rent, a reasonable satisfaction for the use and occupation of the premises which have been holden and enjoyed under the demise; and it is provided on his behalf, that if the demise be produced against him, it shall not defeat his action, as it would have done before the statute; but the fixed rent shall only be used as a *medium*, by which the uncertain damages to be recovered in this form of action shall be liquidated. The statute meant to provide an easy remedy in the simple case of actual occupation, leaving other more complicated cases to their ordinary remedy." (i)

which by landlord recovers a compensation for permitting tenant to occupy.

The action is founded on a contract express or implied, and unless there be such a contract, the action cannot, it seems, be maintained. (k)

Assumpsit for use and occupation lies against A., who having agreed to rent lands, in fact, never occupies himself, but suffers B. to enter and occupy them as his tenant. (l)

Where use and occupation lies.

Use and occupation will lie for the recovery of rent from tenant from year to year, for the period between the destruction of the premises by fire, and the regular determination of his tenancy. (m)

If the steward of a person not named, says to an occupier,

(i) *Per Eyre, C. J., Naish v. Tatlock*, 2 Hen. Bl. 323. 18.

(m) *Izod v. Gorton*, 5 Bing. 501

(k) *Birch v. Wright*, 1 T. R. 378. N. S.

(l) *Gregory v. Badcock*, 2 Smith,

"I let you into possession in the name of the landlord," he may afterwards shew by parol evidence, who that landlord is, and it is not open to the tenant to dispute the title of the unnamed landlord. (*n*)

And where the plaintiff declared in *assumpsit* that "in consideration that he would permit the defendant to occupy a house for four weeks, at ten guineas *per* week, the defendant undertook to pay the said rent, the Court of King's Bench held that the plaintiff was entitled to recover, though the defendant never took possession; and that the letting and hiring was evidence of a promise sufficient to enable the party to bring *assumpsit*." (*o*)

But in a case in which there was an agreement for the letting of down land for the purpose of digging and working copper ore, the judge at Nisi Prius directed the jury that if they thought the defendant never took possession, they ought to find a verdict in his favour, and that the digging of holes for the purpose of examining the property, was not necessarily taking possession. The jury found for the plaintiff. (*p*)

When there is
no demise by
deed.

The statute only gives this remedy where there is no *demise* by deed. (*q*) But where there were articles of agreement under seal by which A. agreed to let, and make a lease to the defendant, Lord *Kenyon*, C. J., held that the defendant might be charged in *assumpsit* for his use and occupation of the premises, because he did not hold under the deed, it being merely an *agreement* for a lease, (*q*) and if the lessor afterwards assign the premises to a third party, such assignee may maintain an action for use and occupation

(*n*) *Per* Tindal, C. J., in *Fleming and others v. Gooding*, 10 Bing. 549.

(*o*) *Bull v. Sibbs*, 8 T. R. 327.

(*p*) *Jones v. Reynolds*, 7 C. & P. 335.

(*q*) *Dungay v. Angove*, 2 Ves. jun. 307.

(*q*) *Elliot v. Rogers*, 4 Esp. 59. *S. P. Bannister v. Usborne*, K. B. Sittings after H. 36 Geo. III. cited *Peake's Evid.* 22.

after notice given to pay the rent to him. (r) And where a lease by deed has expired, and the tenant holds over, the landlord may recover for the subsequent occupation of the lessee or his under-tenant in an action of *assumpsit*. (s)

Where the contract is proved, the action lies for constructive as well as actual occupation, (t) and if there has been an actual occupation, it lies in respect of incorporeal hereditaments. (u) A corporation aggregate may also sue for use and occupation where the tenant has held premises under them and paid rent. (v)

The terms of the statute may seem in strictness only to include those cases in which the relation of landlord and tenant exists. But the courts have given a wide and liberal construction to it; and it now appears to be settled, that wherever one party occupies by the permission of another, in the absence of any express contract between the parties, the fact of the one having occupied by the sufferance of the other, may be sufficient to raise an implied *assumpsit* by the occupier to pay for his occupation.

Whenever an implied contract is raised by the occupation of the tenant with the permission of the owner.

This point was adjudged by the Court of Exchequer, in opposition to a previous decision of the Court of Common Pleas. In the latter case it had been held that, where a purchaser took possession of premises under a contract to purchase, which purchase was not completed on account of the vendor's being unable to make a title, the vendor had no right to charge the purchaser, for the time he had remained in possession, upon an implied contract for use and occupation. (w) This case cannot, however, be considered as having decided any general rule of law; because the Court

(r) *Rawsen v. Eicke*, 2 Nev. & P. 422.

(s) *Harding v. Crethorn*, 1 Esp. 57.

(t) *Pinero v. Judson*, 6 Bing. 206.
Edge v. Strafford, 1 C. & J. 391.

(u) *Bird v. Higginson*, 4 Nev. & M. 505.

(v) *Stafford (Mayor of) v. Till*, 4 Bing. 75. 12 Moore, 260.

(w) *Kirtland v. Pounsett*, 2 Taunt. 145.

seems to have been influenced in their judgment by the circumstance of the purchaser's having paid the purchase money upon his entrance, which the vendor had kept during the purchaser's possession. And *Mansfield*, C. J., upon this observed, "that if no money had been paid, it *might* have been a different question; but if a man pays part of his money, and is so unwise as to take possession without a title,—is it but just that the one party should take back his money, and the other take back his house?" It must be observed, however, that his lordship went on to say, "a contract cannot arise by implication of law, under circumstances the occurrence of which neither of the parties ever had in contemplation." (x)

Hull v.
Vaughan.

The case in the Court of Exchequer above alluded to arose under peculiar circumstances. (y)

It was an action for use and occupation, tried before *Holroyd*, J., at the Hereford Summer assizes, 1818 : it appeared that in 1804, Vaughan, the defendant agreed to sell some freehold property to a Mr. Bach, an attorney, at that time, the defendant's solicitor. Bach immediately afterwards sold the property by public auction in lots. Hull, the plaintiff became the purchaser of one of those, (the premises in question,) and took possession at Candlemas, 1805; having paid by far the greatest part of the purchase-money; but there was no agreement made between Bach and him in writing. The other lots were sold to various persons, (among whom was the defendant himself,) and all of them entered into possession. When the time arrived which had been agreed on for the completion of the original purchase by Bach, Vaughan refused to complete the contract. Bach then, after having tendered the purchase-money and deeds of conveyance for execution, filed a bill to compel specific performance, and for an injunction to restrain actions of ejectment brought by Vaughan against the vendees in pos-

(x) 2 Taunt. 147.

(y) 6 Price, 157.

session. The injunction was granted, and the cause was set down for hearing in the early part of the year 1813. About that time Vaughan, the defendant, availing himself of a report then prevalent, (in consequence of Bach having been attached for not paying the purchase-money into Court, in pursuance of the terms on which he had obtained the injunction,) that he had succeeded in the suit, required the plaintiff, Hull, to deliver up to him the possession of the premises which he had bought of Bach, which, under the influence of the rumour, Hull consented to do. Hull, soon afterwards, discovered that the suit in equity between Bach and the defendant had not been determined, Bach having by that time paid in the purchase-money; and he then demanded back possession of the land from Vaughan, who refused to restore it. Hull afterwards knocked the lock off the gate and took possession. Vaughan took possession again; and putting on another lock, kept it till the month of April, 1815, a period of two years.

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During the time that Hull, the plaintiff, had had possession under his contract for the purchase of the premises, he had improved the land from rough ground into productive hop-ground and orcharding, and it had become worth double the sum which he had originally agreed to pay Bach for it. Vaughan, on taking possession, had agreed to allow Hull a fair valuation price for the hop-poles on the premises, which were of considerable value, and the apple trees which he had planted, but which he never paid.

The suit in equity being afterwards (in 1815) finally determined in favour of Bach, the plaintiff therein, Vaughan then took the purchase-money out of Court—gave up possession of the estate—and executed the deeds which had been before tendered to him for that purpose by Bach.

The learned judge ruled, that this was a case where the plaintiff could not maintain the action, which, in this instance, his lordship observed, had been brought by one who

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had no right to the land, against another who had; the purchase-money not having been paid at the time; and that whatever remedy the plaintiff might have had against Bach, he could not sue the defendant in the present form of action, which was in effect, as between these parties, suing a man for the use and occupation of what in legal construction was his own land. The plaintiff was accordingly nonsuited; and a rule to set aside the nonsuit was granted by the Court of Exchequer.

The arguments on either side were shortly as follows:— It was argued for the plaintiff, that the defendant having received the money agreed upon, as the price of the land, could have no right to occupy the premises without paying rent to some person; and that the plaintiff having voluntarily given up the possession to the defendant, it was but just that the plaintiff should recover for having so permitted the defendant to occupy the premises, plaintiff's right to which had been subsequently ascertained.

On the part of the defendant it was contended, that the statute expressly required some parol agreement between the parties constituting the relation of landlord and tenant. That here neither that relation existed, nor that of owner and occupier, nor even of vendor and vendee. That the dispute was entirely between the defendant and Bach; and that no interest could exist in the plaintiff till this dispute was settled; he in the meantime having neither the legal nor equitable right to the possession of the premises.

In the argument, a decision of Lord *Kenyon's* was relied upon by the counsel for the defendant: that was a case in which A. had agreed to sell a wharf to B., stating that he had a lease of thirteen years to run, and under this agreement B. was let into possession, but afterwards discovering that A. had only an interest for three years, refused to complete his purchase; it appeared in evidence in an action by A. for use and occupation, that so far from being a beneficial occupation to B.,

he had been put to great expense in removing timber to the wharf, which was intended there to remain. Lord *Kenyon* said, that "to maintain an action for use and occupation, it must appear that the occupation has been beneficial to the defendant. That the occupation here had been injurious to the defendant, who, had he been told that the plaintiff had only a term for three years, would never have entered upon them;" and, therefore, his lordship directed a nonsuit. (s) But to this it was answered by *Richards*, C. B., that from Lord *Kenyon's* decision the plain inference was, that had the occupation been advantageous to the occupier, his lordship would have considered him liable in that action, although it was quite clear that there was no privity between the parties in the character of landlord and tenant, for they stood in the relationship of vendor and vendee. (a)

Hull v. Vaughan.

The Court made absolute the rule for setting aside the nonsuit. They considered that the plaintiff had an *equitable* interest in the premises. That it was unnecessary that the relation of landlord and tenant should exist, or be in the contemplation of the parties: and that the plaintiff, having suffered the defendant to enter into the premises, and permitted him to occupy them, the consideration stated in the declaration was fully proved, and he was consequently entitled to recover. (b) It may, however, be doubtful, whether the language of the Court in this case is to be taken in its full extent.

The question again arose in an action in which it appeared that the plaintiff had, in April, 1817, agreed with the proprietor of a house for the purchase of the lease, and had paid part of the consideration, and given bills for the rest, which bills became due in the following December. In April a Mrs. *Musters*, the plaintiff's mistress, took possession of the house by his permission, and the plaintiff quitted this country, and returning in October, found the defendant

(s) *Hearn v. Tomlin*, Peake N. P. 192.

(a) 6 Price, 169.

(b) *Hull v. Vaughan*, 6 Price, 157.

living in the house with Mrs. Musters. Mrs. Musters agreed to take up the bills which had been given by the plaintiff for the remainder of the purchase money, and he gave directions that the conveyance of the house should be made to her. Mrs. Musters, however, neglected to take up the bills; and about Christmas, 1817, she married the defendant, who continued in the possession of the house up to the commencement of the action. The plaintiff failed in proving a notice to the defendant to pay rent to him. Upon these facts it was objected that the plaintiff, who *had a mere equitable* title to the premises, and had shewn no contract, either express or implied, on the part of the defendant to pay rent, could not recover; and of this opinion was *Abbot, C. J.*, though *Hull* and *Vaughan* was brought under his Lordship's notice, there being nothing from which any contract could be inferred to pay rent for a year, a month, or any other period. (c)

In another case at Nisi Prius, *Best, C. J.*, distinguished *Hull v. Vaughan*, from *Kirtland v. Pounsett*, on the ground that in the former case the bargain went off through the tenant's fault, and he therefore ruled that when a party occupied under an agreement for a lease, which went off by reason of another person having some interest in the premises, an action for use and occupation could not be maintained, although the party in possession had received rent from the under-tenants. (d)

But this latter case seems overruled by the case of *Neal v. Swind*, (e) in which it was decided, that if a party in expectation of a lease procures attornments from some of the tenants, and receives rent from others, he will be liable to an action for use and occupation.

Where there
is a void or
illegal contract

Where an express contract has been entered into, which cannot be enforced, the law will not imply a contract to entitle

(c) *Keating v. Bulkeley*, 2 Stark. 419.

(d) *Rumball v. Wright*, 1 C. & P. 589.

(e) 2 Cro. & J. 377. 2 Tyr. 464.

a plaintiff to recover in this form of action; neither can a landlord, where rent is expressly reserved payable at stated periods, recover a proportionable part of the rent, for the occupation of his premises for any time short of such periods. Therefore, where A. demised to B. the first and second floor of a house for a year, at a rent payable quarterly; and during a current quarter some dispute arising between the parties, B. told A. that she would quit immediately, and A. answered, she might go when she pleased, and B. quitted, and A. accepted possession of the apartments. It was held that A. could neither recover the rent, which, by virtue of the original contract, would have become due at the expiration of the current quarter; nor rent *pro rata*, for the actual occupation of the premises for any period short of the quarter. (e)

the plaintiff shall not recover on an implied one.

In a case in which the trustees of an insolvent put a person into possession to carry on the trade and disposed of the stock, but no other act was done by them to induce the landlord to believe they took possession as tenants, and the jury found there was no occupation, it was held on argument, they were not liable for use and occupation. (f)

Although in a letting by auction there is an express stipulation that the rent shall be paid to the auctioneers or their order, but the owner signs the conditions, the auctioneers will be considered as agents only, and the owner will be entitled to maintain his action for use and occupation. (g)

A slight recognition of title will be sufficient, as where the defendant said, "I do not consider the land yours, but prove your right and I will pay you;" this will be held sufficient to maintain use and occupation. (h)

(e) *Grimman v. Legge*, 8 B. & C. 324; and see *Whitehead v. Clifford*, *infra*, 524. Moo. & M. 479.

(f) *How v. Kenneth*, 5 Nev. & M. 1, *et vide* *Carter v. Warne*, 1 (g) *Evans v. Evans*, 3 B. & Ell. 132.

(h) *Cripps v. Blank*, 9 Dowl. & Ryl. 480.

Where several persons rented premises which were used as a *Jewish* synagogue, the seats in which were let out by an officer appointed for that purpose, who received the sums for which they let, and applied them partly in the payment of the rent of the premises, and partly for general purposes connected with the Jewish religion; it was objected that an action for the use and occupation of a seat in the synagogue ought to have been brought in the name of the officer, and not of the lessees of the premises. But *Abbot, C. J.*, was of opinion, that in point of law the contract was to be considered as made with the lessees, who had the legal title to the premises: and that the action was, therefore, rightly brought in their name. (*f*)

It does not lie where the premises are let for prostitution.

Where the plaintiff's wife, who managed the business of the house in letting lodgings, had let rooms to the defendant, knowing her to be a prostitute, and consenting to her receiving visitors for the purpose of prostitution, Lord *Kenyon* ruled, that the contract was *contra bonos mores*, and the action therefore not maintainable. (*g*) Where, to an action for use and occupation, it was set up as a defence, that the defendant was an infant and a prostitute, *Eyre, C. J.*, was of opinion that this was no bar to the action; because both an infant and a prostitute must have lodging: but it being shewn that the lodging was let to the defendant for the purposes of prostitution, with a knowledge of that fact on the part of the plaintiff, his lordship held that the action was not maintainable. (*h*)

The defendant shall not dispute the title of his landlord,

Whenever it appears that the defendant has come in under the plaintiff, the rule of law, that a tenant shall not dispute his landlord's title, prevails, and he will not be permitted to shew that the plaintiff has no legal estate. Thus, where

(*f*) *Israel v. Simmons*, 2 Stark. 356.

(*g*) *Girardy v. Richardson*, 1 Esp. N. P. 13.

(*h*) *Crisp v. Churchill*, cited 1

B. & P. 340; and see *Howard v. Hodges*, 1 Selw. N. P. 68, 9th edit. *Jennings v. Throgmorton*, 1 Ry. & M. 251. *Appleton v. Campbell*, 2 C. & P. 347.

premises had been let to B. for a term determinable by a notice to quit, and pending such term C. applied to A., the landlord, for leave to become the tenant instead of B., and A. consenting, C. agreed to stand in B.'s place, and offered to pay rent. It was held, that (though B.'s term had not been determined either by a notice to quit, or a surrender in writing) A. might maintain an action for use and occupation against C., and the latter could not set up B.'s title in defence to that action. (i)

And in an action for use and occupation by an incumbent against the tenant of the glebe lands, the defendant cannot give evidence of a simoniacal presentation of the plaintiff with a view to disputing his title. (k)

And although in ejectment, where the tenant is equally debarred from proving that his landlord *never had* any title, he may shew that the landlord's title has expired; (l) yet it seems, that, in an action for use and occupation the defendant will not be permitted, though he admit the landlord's original title, to shew that it has ceased to exist, unless he solemnly renounced the plaintiff's title at the time, and commenced a fresh holding under another person. (m)

The grantee of a reversion stands in the place of the lessor; and as attornment is now unnecessary, the tenant can no more dispute his title than that of the original landlord. Thus, where a house was devised to a trustee, in trust for a devisee, for her sole and absolute use, and she afterwards married B., who let part of it, under a written agreement, *signed by himself only*, to the defendant, as a yearly tenant, and afterwards granted a lease for years of the whole of the house, to the plaintiff, which the wife refused to execute,

or of any one
claiming under
his landlord;

(i) *Phipps v. Sculthorpe*, 1 B. & A. 50, *vide* *Hyde v. Moakes*, 5 C. & P. 42. *Woodcock v. Nuth*, 8 Bing. 470. 1 Moo. & Sc. 317.

(l) *England dem. Syburn v. Slade*, 4 T. R. 682, *et vide supra*.

(m) *Balls v. Westwood*, 2 Camp. 11.

(k) *Cook v. Loxley*, 5 T. R. 4.

although she was named therein; the defendant had notice of the lease, and was required to pay any rent that might subsequently accrue to the plaintiff. It was held, in an action for use and occupation, that the defendant was liable to the plaintiff, and could not impeach his title, as he must be taken to stand in the same situation as B., whose title as landlord the defendant had acknowledged, by occupying and enjoying the premises under him. (o) And as the interests of the tenant for life and of the reversioner are the same, the tenant in possession having paid rent to the tenant for life, cannot set up a title in a third person to defeat the interest of the reversioner, in an action by him after the death of the tenant for life. (p)

grantee of the
reversion may
sue after
notice ;

As soon, therefore, as the grantee of the reversion has given notice to the tenant of the conveyance to himself, he may call upon him for payment of his rent from the time of the notice; and, where the demise has been without deed, may maintain use and occupation against the tenant. (q)

or a trustee
for annuitant,

In like manner the trustee for annuitants charged upon premises in lease, after notice of the grant to the tenant may maintain this action. Thus in the case last cited, (r) which was an action of *indebitatus assumpsit* for use and occupation; at the trial a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench, on a case which stated in substance as follows: "That the defendant, before the 18th of July, 1777, was tenant from year to year of the lands in question to Mr. Bowes, at the yearly rent of 223*l.* 10*s.* payable half yearly, *vis.*, on the 12th of May, and the 22d of November. That by indenture of the 18th of July, 1777, Mr. Bowes and his wife, Lady Strathmore, granted annuities to several persons therein named, for the life of Lady Strathmore; and they covenanted to levy a fine to the use of the plaintiff and Mr. Goostrey, (since dead)

(o) *Rennie v. Robinson*, 7 Moore, Ryl. 1.
539.

(q) *Birch v. Wright*, 1 T. R. 375.

(p) *Doe v. Whitroe*, 1 Dowl. & (r) *Ibid.*

upon trust to receive the rents and pay the annuities out of them, and then to pay the residue to Mr. Bowes and Lady Strathmore. That a fine was levied accordingly. That the defendant paid all the rent due on the 22d of November, 1784, except 81*l.* 15*s.* to Mr. Bowes, which sum of 81*l.* 15*s.* was still unpaid; and no rent had been paid by the defendant since that time. That in May, 1785, the plaintiff and Goostrey brought an ejectment against the defendant, and laid the demise on the 6th of April, 1785. That in Trinity Term, 1785, they obtained judgment, and in September, 1785, gave notice to the defendant of their title, and required him to attorn to them, and to pay to them the money already in his hands: but the defendant refused to attorn; and thereupon a writ of possession was executed, and the defendant quitted the premises mentioned in the declaration. That Lady Strathmore was then living." The question for the opinion of the Court was, whether the plaintiff was entitled to recover any, and what sum of money in this action. And the Court were of opinion, that the plaintiff was entitled to recover in this action all the rent due from the defendant, which remained in his hands, at the time of the notice from the plaintiff, down to the day of the demise in the declaration in ejectment, but not afterwards.

In a modern case it was decided that where a mortgagee mortgagee. had given notice to tenants holding the mortgaged premises, under leases granted by the mortgagor *after* the mortgage, to pay the rents to himself, the tenants were justified in paying to him all rents unpaid at the time of the notice, as well as those accruing due afterwards. And that where such rents were received by the agent of the mortgagor subsequent to his bankruptcy, and were not actually paid over, the agent might retain them in order to pay the interest accruing due on the mortgage to the mortgagee, who had required him to do so, and that the assignees could not recover them. (*s*) The ground of this decision appears to have been that the mortgagees might have evicted the tenants and brought actions

(*s*) Pope v. Biggs, 9 B. & C. 245.

against them for mesne profits, but it seems the rents could not have been recovered from the tenants if they had refused to pay them *quâ* rents. (t)

So where after a demise of land the lessor conveyed the reversion to trustees for the benefit of A. and before the tenant paid his rent to his original landlord, he received notice from the *cestui que trust* of his title, though not of the legal title of the trustees, the Court of King's Bench held this to be sufficient notice to enable the trustees to maintain use and occupation against the tenant, for rent due subsequent to the notice. (u)

It does not lie for rent due antecedently to tenant's actual possession ;

The landlord cannot charge the tenant for the antecedent occupation of the person from whom he received the premises. In an action against the assignees of B., a bankrupt, the declaration stated that the defendants on such a day were indebted to the plaintiff for the use and occupation of two houses, &c., before that time occupied *as well by the bankrupt, whose estate therein the defendant afterwards had, as the defendants, at their special instance and request*, for one year then elapsed, and as tenants thereof respectively to the plaintiff and by his permission. The second count was upon a *quantum meruit* to the same effect as the *indebitatus assumpsit*. The facts of the case were, that after B. had occupied the premises during part of the year under an agreement to pay 70*l.* a-year for them, he became a bankrupt, whereupon the defendants, his assignees, entered into possession, and continued in the possession for the remainder of the year. A proportion of the annual rent for that part of the year during which the defendants were in possession was paid into court. It was holden that if the plaintiff could recover at all in this form of action against one person for the use and occupation of another, (as to which the Court would not give any opinion,) (v) it must be on the ground of that occupation having been permitted at the defendant's

(t) *Vide supra.*

(u) *Lumley v. Hodgson*, 16 East, 99,

(v) This seems to be settled in the affirmative by the case of *Bull v. Sibbs*, 8 T. R. 327.

request, and that request must be proved; that the words "at the special instance and request of the defendants," were in this case words of substance, and operative, connecting the occupation of the defendants, for which they were bound to make a satisfaction, with the occupation of B., a stranger, for whose occupation, *primâ facie* at least, the defendants were not liable; that in point of fact it was not at the request of the defendants that B. had been permitted to occupy. The defendants had no relation to B. but as his assignees; and that relation did not commence until the close of B.'s occupation: that relation, therefore, alone could not have the effect of making them personally liable to answer for his occupation before his bankruptcy. The averment that he had been permitted to occupy "at the request" of the defendants was, therefore, substance and not mere form; and, as the plaintiff had failed in the proof of it, he was not entitled to recover from the defendants the rent due for B.'s occupation. (v)

But in a subsequent case, where the assignees of a bankrupt had entered upon land in the middle of a quarter, which the bankrupt had agreed to take upon a building lease, on the terms of paying the rent half-yearly, it was held that the action would lie against them for a whole year, though they had not occupied during all the time, on the ground that they took subject to all the liabilities of the bankrupt, but the case of *Naish v. Tatlock* was not cited. (w) And where a feme sole has occupied a house, and marries, her husband is not liable in an action for use and occupation for her tenancy previous to the coverture. (x)

Where the tenant has not obtained possession under the plaintiff, and the tenant has not paid him rent, the plaintiff can only charge him for use and occupation from the time at which he became seised of the legal estate, although he may have had

(v) *Naish v. Tatlock*, 2 H. Bl. 319. does not appear to have been cited.

(w) *Gibson v. Cowthorpe*, 1 D. & R. 205. Note, *Naish v. Tatlock*, (x) *Richardson v. Hall*, 1 B. & B. 50.

an equitable estate long before. (y) The defendant entered upon a leasehold cottage under J. S. who soon after mortgaged it to W. S., and in 1806 assigned the equity of redemption to the plaintiff. On the 18th of July, 1808, W. S. assigned the legal estate in the premises to the plaintiff. The defendant continued in possession till the Michaelmas following, and had paid no rent for the last two years. It was contended that although a person, having the equitable estate only, could not, perhaps, maintain use and occupation without privity of contract; yet the plaintiff being now clothed with the legal estate, his title would have reference to the time when the equity of redemption was assigned to him so as to entitle him to two years' rent. But Lord Ellenborough clearly held, that he could only recover rent for the period between the 18th of July and Michaelmas day, 1808. (z)

It lies for rent due after the premises are burnt,

Where premises have been demised, for a term under a written agreement, the landlord may recover in an action for use and occupation, the rent accruing after the premises are burnt, and no longer inhabited by the tenant. For as long as the term continues, the landlord cannot enter to rebuild; and the tenant must, therefore, be taken still to hold the land, which is sufficient to satisfy the words of the statute of the 11 Geo. II. c. 29. (a) But a tenant from year to year, not under any agreement to repair, may quit without previous notice to his landlord, on the premises becoming unsafe and useless from want of repairs; and he will not be liable, in an action for use and occupation, for any rent after the occupation has ceased to be beneficial (b) or unwholesome for want of sufficient drainage, without great and unreasonable labour and expense in repair. (c) But if the premises are consumed by fire, tenant from year to year will be liable to an action for use and occupation, until the regular determination of his tenancy. (d)

(y) See, however, *Hullo v. Vaughan*, and *Keating v. Bulkely*, *supra*.

(z) *Et vide Morgell v. Paul*, 2 Man. & Ryl. 303.

(a) *Baker v. Holtzapffel*, 4 Taunt. 45. 18 Ves. 115.

(b) *Edwards v. Etherington*, 1 Ry. & M. 268. 7 D. & R. 117.

(c) *Collins v. Barrow*, 1 Moo. & Rob. 112.

(d) *Izod v. Gorton*, 5 Bing. 301. N. S.

Use and occupation lies, where the tenant quits the premises without any regular determination of the demise. And where in an action for the use and occupation of apartments in the plaintiff's house during half a year, it appeared that the rent was claimed in consequence of the defendant having neglected to give a notice to quit; and the defence set up was, that the plaintiff, after the defendant had quitted, had put up a bill at the window; Lord *Kenyon*, C. J., expressed an opinion that the defence insisted on would afford no answer to the plaintiff's action. It was for the benefit of the defendant that the apartments should be let; nor would he infer from the circumstances of the landlord's endeavouring to let them, that the contract was put an end to; there must be other circumstances to shew it, and not merely an act of so unequivocal a kind; and as the plaintiff had proved the taking the premises, and the payment of the rent, it was incumbent on the defendant to prove, by express evidence, that the tenancy was determined. (e)

or after the tenant has quitted without the demise being determined.

Where the defendant, in 1799, agreed to take the premises for seventeen years at a yearly rent, and entered; and in 1813, the plaintiffs contracted to sell the fee to A., who thereupon bought from the defendant the residue of his term, *and without the assent of the plaintiffs*, put in a new tenant, who occupied for two years, and then the contract for sale of the fee was rescinded. It was held, that the plaintiffs were entitled to recover from the defendant, in an action for use and occupation, the rent from 1813 to the end of the original term, as there had been no surrender in writing of his interest, and as the plaintiffs had not assented to the change of tenancy. (f) This case is clearly distinguishable from *Phipps v. Sculthorpe* before noticed. (g)

Where, however, a tenant from year to year, at a rent

(e) *Redpath v. Roberts*, 3 Esp. 225, recognized by Lord Ellenborough in *Mills v. Bottomley*, cited Selw. N. P. 1421, 9th edit.

(f) *Matthews v. Sawell*, 8 Taunt. 270.

(g) *Supra*, p. 517.

payable half yearly, without giving any notice to the landlord, quitted the premises at the expiration of a year; and before the next half year expired, the landlord let the premises to another tenant who occupied them; it was held, that the landlord was not entitled to recover rent from the first tenant from the expiration of the year, when he quitted the premises, to the time when the landlord relet the same to the second tenant the contract for letting being entire. (g)

So where a lessee quitted apartments which he had taken for a year, in the middle of his term, and the lessor let them by the week to another tenant, it was held that the lessor could not recover, in an action for use and occupation, against the lessee for a subsequent portion of the year, during which the apartments had been unoccupied. (h)

And where a landlord, in the middle of a quarter, accepted from his tenant the key of the house demised, under a parol agreement that upon her then giving up the possession the rent should cease, and she never afterwards occupied the premises, it was held, that he could not recover in an action for the use and occupation of the house for the time subsequent to his accepting the key. (i)

not if tenant
be treated as a
trespasser;

A party can be charged for use and occupation so long only as the plaintiff treats him as his tenant; for if the owner treat the occupier as a trespasser, he cannot claim rent of him; and, therefore, if he recover the lands in ejectment, he cannot afterwards charge the defendant for use and occupation beyond the day of the demise in the ejectment. (k) But the action was held to lie against a lessee from year to year, notwithstanding bankruptcy and the occupation by his assignee during part of the term for which the rent accrued. (l)

(g) *Hall v. Burgess*, 5 B. & C. 332.

(h) *Walls v. Atcheson*, 3 Bing. 462.

(i) *Whitehead v. Clifford*, 5 Taunt. 518; and see *Grimman v.*

Legge, *supra*, 515.

(k) *Birch v. Wright*, 1 T. R. 378.

Carmier v. Mercer, cited *ibid.* 387. And see *Doe dem. Cheny v. Batten*, Cowp. 243.

(l) *Boot v. Wilson*, 8 East, 311.

If the rent be entire, and the landlord evict the tenant out of part of the demised premises, the tenant may abandon the residue, and in that case he cannot be charged for the occupation of any part. (m) But if, after the eviction, he still continue to occupy the residue, it seems that he may be charged for such occupation upon a *quantum meruit*. (n) or after eviction.

If A. let lands to B., who underlets to C. and others; and during these tenancies A. gives notice to C. and the other under-tenants to quit, and C. quits, and the lands before occupied by him remain unoccupied for a year, and are then again let by B.; A. cannot recover against B. for the use and occupation of this land for the year in which it was unoccupied; such a case amounts to an eviction, and may be pleaded to the whole demand. (o)

If one of several executors enters on the demised premises, such entry will not enure as the entry of all, so as to make all the executors liable in an action for use and occupation. (p)

The declaration for use and occupation may be as general in *assumpsit* as in *debt*; and the same rule as to setting out the local situation applies to either form of action. (q) Declaration.

A plea of *nil habuit in tenementis* is bad both in *assumpsit* and in *debt* for use and occupation. (r) Plea.

In an action by a surviving owner for the use and occupa-

(m) *Smith v. Raleigh*, 3 Camp. 513; and see *Pope v. Biggs*, 9 B. & C. 245.

(n) *Stokes v. Cooper*, 3 Campb. 513, note. And see *Tomlinson v. Day*, 2 B. & B. 680.

(o) *Burn v. Phelps*, 1 Stark. 94.

(p) *Nation v. Tozer*, 1 C., M. & R. 172.

(q) *Guest v. Caumont*, 3 Camp. 235, et vide 9 Geo. IV. *supra*. For the declaration for use and occupation in *debt*, vide Chitt. on Plead. Vol. II. p. 36, 6th edit. The ex-

ception in favour of debts for rent in the *London Court of Conscience Act* (3 Jac. I. c. 13), and the *Tower Hamlet Act*, 23 Geo. II. c. 30, extends to the action for use and occupation. Vide *Woolley v. Cloutman*, Dougl. 244. *Holden v. Newman*, 13 East, 161. *Secus*, in *Middlesex*, vide *Parker v. Vaughan*, 2 B. & P. 29.

(r) *Curtis v. Spitty*, 1 Bing. 15. N. S. 4 Moo. & Sc. *Lewis v. Willis*, 1 Wils. 314.

tion of premises under two jointly, it is not sufficient to allege that the premises were held by the sufferance and permission of the surviving owner only: (*r*) but in such case there are two modes of declaring: either by alleging that the defendant was indebted to both, for the use and occupation by the permission of both; or that he is indebted to one, for the use and occupation of the premises, held and enjoyed by the joint permission of both. (*s*)

Evidence.

In an action for use and occupation, the plaintiff is allowed to resort to the original agreement, though void under the Statute of Frauds, in order to ascertain the amount of the rent due. (*t*)

But where a lessee took a farm under an agreement which he never signed, and the terms of which his lessor omitted to fulfil, in an action for use and occupation, the Court of C. P. held that the Jury were not bound by the amount of rent mentioned in the agreement, but might ascertain the value of the land by other evidence, and give their verdict accordingly. (*u*)

A printed paper read to the tenant, and assented to by him, although not signed by either of the parties, may be referred to by the attorney to shew the terms of the letting. (*v*)

Where premises had been demised by two tenants in common, and the rent for a time paid to the agent of both, but afterwards the tenant had notice to pay a moiety of the rent to each of the two, and separate receipts were thereupon given; it was holden to be a question of fact for the jury whether or not the parties meant to enter into a new contract with a separate reservation of rent to each. (*w*)

(*r*) *Israel v. Simmons*, 2 Stark. 356.

(*s*) *Per Holroyd, J., ibid.* 360.

(*t*) *De Medina v. Polson*, per Gibbs, C. J., Holt, 47.

(*u*) *Tomlinson v. Day*, 2 B. & B. 680.

(*v*) *Lord Bolton v. Tomlin*, 1 Nev. & P. 247.

(*w*) *Powis v. Smith*, 5 B. & A. 850.

SECTION IV.

OF THE LANDLORD'S REMEDY FOR BREACH OF COVENANT
OR AGREEMENT.

The action of covenant lies not only for the rent reserved, but also for damages in all cases in which any covenant, express or implied, has been broken. And where lessee for years had been ousted, the ancient remedy was by writ of covenant, by which, when ousted by the lessor, and the term was still in being, he recovered the term and damages; or if the term were expired, or the ouster were committed by a stranger claiming an elder title, damages only. (*x*)

1. By action
of covenant.

Whether a party has broken any of his covenants or not, is a matter properly triable at law, as the damages (supposing a breach) cannot be settled without such trial. (*y*)

The action of covenant lies only where the covenant upon which the defendant is to be charged has been made by him by deed under seal, either indented or polled; (*z*) for if A. and B. enter into a covenant, and only A. seal, he cannot maintain covenant against B.; (*a*) a rule not without exceptions; thus, if a lease be made to A. and B. by indenture, and A. seal a counterpart, and B. agree to the lease, but do not seal, B. may be sued for covenant broken; (*b*) and where the crown by letters patent, grants a lease to A., which A. *accepts*, without sealing any counterpart, his mere acceptance

Lies only on
deed under
seal.

Exceptions.

(*z*) 2 Bl. Com. 158.

Esp. 42.

(*y*) *Stafford v. London (City)*, 4 Bro. P. C. 635.

(*b*) Co. Lit. 231. *a.* *Brett v. Cumberland*, 2 Rol. Rep. 63.

Vernon v. Jeffreys, Str. 1146. S. C. 7

Mod. 358.

(*z*) *Fitz. Nat. Brev.* 145. c.

(*a*) *Sutherland v. Lishman*, 3

binds him, and he may be sued in covenant. (c) By local custom also, (as in London and Bristol,) covenant lies, though the demise be by parol; (d) which custom must be taken so strictly as only to charge the party to the demise, and not his representatives. (e)

An action of covenant cannot be brought upon an indenture or deed-poll by a person who is not a party thereto, although the covenant be for his benefit. (f)

Tenants in common may sue in covenant the lessee of a house, who after the demise, but before the breach alleged, becomes a co-tenant with the plaintiffs in the same estate. (g)

When the
covenantees
should join.

The necessity of joining the several covenantees *as plaintiffs*, in an action of covenant depends entirely upon the nature of their interest, and of the cause of action arising out of the covenant; for if such interest be joint, no words of severalty can dispense with the necessity of joining the parties. For instance, if the interest be joint, though the covenant be made with A. and B. *jointly and severally*, or with A. and B. *and with each of them*, A. and B. must nevertheless join in the action. (h)

A. demised premises to B. and died, having devised a moiety of his reversion to C. and the other moiety to D.; it was agreed by the Court that C. and D. might sue jointly for the rent. (i)

B., by indenture covenanted with C. and D. and to and

(c) Lord Ewre v. Strickland, Cro. Jac. 240. Brett v. Cumberland, *sup.* S. C. Cro. Jac. 522.

(d) Fitz. Nat. Brev. 146. (A.) Wade v. Bemboe, 1 Leon. 2.

(e) *Ibid.*

(f) Green v. Horne, 1 Salk. 197. *Ex parte* Richardson, 14 Ves. 187.

(g) Yates v. Cole, 2 B. & B. 660.

(h) Slingsby's case, 5 Co. 19. Barry v. Perin, Moore, 849.

Anon. 2 Leon. 47. Saunders v. Johnson, Skin. 401. Yate v. Roules, 1 Bulstr. 25. S. C. Yelv. 177. Eccleston v. Clipham, 1 Saund. 153. S. C. 2 Keb. 338, 335. Spencer v. Durant, 1 Show. 8. S. C. Comb. 115. Anderson v. Martindale, 1 East, 497, *et vide* Platt on Covenants, 127.

(i) Midgley v. Lovelace, Carth. 289.

with E. and F. his wife, (who afterwards became the wife of D.) and their assigns, *and to and with each of them*, that he (B.) at the time of sealing and delivering the indenture was lawfully and solely seised of a certain rectory. An action was brought by D. and F. his wife for a breach of the covenant. After verdict and judgment for the plaintiffs in B. R. the judgment was reversed on error in the Exchequer Chamber, upon the ground, that notwithstanding the words "*and to and with each of them*," the other covenantee should have joined in the action, because the interest which passed to the covenantees by the covenant was joint, and not several. (k) So if a man demise black-acre, white-acre, and green-acre to A. B. and C., and covenants with them, *and each of them*, that he is the lawful owner, this is a joint covenant, and A. B. and C. must all join in an action for a breach of it. (l) And where one covenants with three to pay money to one of them, this is a joint covenant, and all must join in suing upon it. (m)

So where the plaintiff declared that A. covenanted with him and two others, parties to the deed, to pay them an annuity for the use of a third person; though the plaintiff averred that the other two never sealed the deed, it was held on demurrer, that the interest which passed being joint, and the other two being named in the deed as covenantees, not only they *might* sue though they had not executed, (n) but they *must*; and that the declaration was bad, it not appearing that they had refused to assent to the deed which they had omitted to execute. (o) But it is left doubtful by the case, whether the declaration would have been good if it had alleged such refusal.

Where rent was reserved to a person who was *not* a party to the lease, but whose guardian consented for him, and the

(k) *Slingsby's case*, 5 Rep. 19.
S. C. (called *Beckwith's case*), 3
Leon. 160.

(n) See *Clement v. Henley*, 2
Rol. Abr. Fait. F. pl. 2. *Vernon v.*
Jefferys, 2 Str. 1146. 7 Mod. 358.

(l) *Ibid.*

(m) *Per Fenner, J.*, 1 Bulstr. 26.

(o) *Petrie v. Bury*, 3 B. & C.
353.

lessees covenanted with him and the lessors, who were his trustees, to pay rent, &c.: it was held that he could not join with the actual lessors in an action upon the covenant, the Court not being at liberty to presume that any interest passed from any person except the demising parties. (p)

If a lease is made by A. to B., and the lessee enters into the usual covenants, and afterwards A. grants the reversion to C. and D., and the heirs of D., but as to the estate of C. in trust for D., the benefit of the covenants will pass to them jointly, and a declaration for breach of covenant by C. alone will be bad on demurrer. (q)

When they
may sever.

On the other hand, if the interest conveyed by the covenant be *several*, no words of joinder can make it imperative upon all the covenantees to join in the action: for though, inasmuch as the covenant is expressed to be *joint*, they may all join; yet as the interest is several they may *sever* at their option. (r) As if a man demise black-acre to A., white-acre to B., and green-acre to C., and covenant with them that he is the lawful owner of the several acres, the covenant is several, because their interests are several; and each may maintain a separate action against the covenantor in case of a breach respecting his particular interest. (s) So if by deed reciting two distinct annuities granted to A. and B., the grantor covenants with them, their executors, &c., for payment, the covenant is several, and the executors of one of them dying, may maintain an action for breach of covenant; (t) but if the grant of an annuity be to two *habendum* in moieties, with a covenant for payment, the interest is joint. (u)

(p) Lord Southampton v. Brown, 6 B. & C. 718, *et vide* Berkeley v. Hardy, 5 B. & C. 355. 8 Dowl. & Ryl. 102.

(q) Scott v. Godwin, 1 B. & P. 67.

(r) Justice Windham's case, 5 Rep. 8. Wotton v. Cooke, Dyer, 337. Barrey v. Perin, Moore, 849. Wilkinson v. Lloyd, 2 Mod. 82. Eccleston v. Clipsham, 1 Saund.

153. S. C. 2 Kel. 338, 385. James v. Emery, 8 Taunt. 245. *See vide* Anon. 2 Leon. 47.

(s) Slingsby's case, *sub. sup.*

(t) Withers v. Bircham, 3 B. & C. 254. 5 D. & R. 106.

(u) Lane v. Drinkwater, 1 C. M. & R. 599, *et vide* Selwyn's N. P. 465, 9th edit.

If one of several *joint* covenantees be dead, the survivor must aver the death in his declaration. (*s*) And so if one named in the indenture have omitted to seal it, this must be specially averred. (*t*)

When several persons covenant *jointly*, all the covenantors must be made defendants: (*u*) but if they covenant jointly and severally, then it is at the option of the covenantee to sue them jointly or severally; (*v*) which distinction between the necessity of joining several covenantors and several covenantees is thus elucidated by Lord Coke:—"Between *Matthewson* and others plaintiffs, and *Lydiate* defendant, the case was such: a charter party indented between the master and the owner of the ship of the one part, and George *Lydiate* and six other merchants of the other part; by which the master and owner covenant with the merchants to ship certain merchandizes at such a port beyond sea, and to transport them to the city of London; for which each of the merchants covenants *separatim* with the master and owner, that one merchant shall pay 3*l.*, another 3*l.*, &c. *et sic de cæteris*. And the words of the covenant are *conveniunt separatim*, &c., and in the end is this clause, *et ad performance omnium et singularum conventionum ex parte præd' mercatorum perimplend' quilibit mercatorum præd' separatim obligat seipsum præfat' magistro et proprietariis*, in double the freight. And now on one of the several covenants an action of debt was brought against *Lydiate*, one of the merchants on the said indenture. To which the defendant pleaded that the seal of another of the merchants fixed to the said indenture was broken from the deed; upon which the plaintiff did demur in law. And in this case it was resolved:—

When the covenantors should be joined.

" 1st. That although the merchants join in covenant *scil.*

(*s*) *Osborn v. Crosbern*, 1 Sid. 238. *Scott v. Godwin*, 1 B. & P. 67.

(*t*) *Vernon v. Jefferys*, Str. 1146. S. C. 7 Mod. 358.

(*u*) 1 Wms. Saund. 154, n. 1.

(*v*) *Lilley v. Hedges*, 1 Str. 553. S. C. 8 Mod. 166. *Enys v. Donithorne*, Burr. 1190.

conveniunt separatim, yet this word *separatim* makes it several covenants, and not a joint covenant. Also the said later clause *ad performationem omnium et singularum, &c.*, is in law several, by reason of this word *separatim*, and this word shall be referred to the several covenants before.

“ 2d. It was resolved, that although the covenants on the part of the master and owner were joint, yet the covenants on the part of the merchants stood several: and for this cause if the seal of one of the merchants be broken from the deed, it should not avoid the deed but only against him; but if any of the seals of the master or owners had been broken from the deed, all their covenants had been defeated. And if the deed had been razed in the date after the delivery, it had gone to the whole. But when the covenants are several, they are as several deeds written in one and the same piece of parchment. And judgment was given accordingly.” (w)

It is to be observed, that though a covenant be joint, yet if it be broken by the *tort* of one of the covenantors, the other covenantor shall not be charged with this breach of covenant; thus, though on a joint demise by A. and B. an action for breach of the covenant for quiet enjoyment by the entry of a stranger, must be against *both*, yet if one of the covenantors enter tortiously upon the lessee, his act shall not be charged upon the other; but the covenant shall for this purpose be taken as several, and the wrong-doer alone be sued. (x)

Upon the whole, therefore, it appears that where there are several covenantees, they *must* all join if their interest be joint, although the covenant be several; but *may* all sever if their interest be several, although the covenant be joint; and that when there are several covenantors, they *must* all be joined, where the covenant is joint, and not several; but *may* either be joined or sued separately, when the covenant is several as well as joint.

(w) Mathewson's case, 5 Rep. 23. 97. S. C. 1 Salk. 137. Show. 79.
 (x) Coleman v. Sherwin, Carth.

The non-joinder of joint covenantees, where no averment is made in excuse of such omission, (as that they are dead, or have not sealed,) (*y*) is a fatal variance, and ground of non-suit upon plea of *non est factum*. (*z*) Where the omission of any plaintiff, who ought to be joined, appears upon the face of the declaration, the defendant may demur generally, bring error, or move in arrest of judgment: (*a*) where it does not so appear, he may crave oyer of the deed; and, having thus brought the omission upon the face of the pleadings, take the same course as if it had appeared by the declaration. (*b*)

Consequence
of non-joinder.

But the non-joinder of several joint covenantors can be taken advantage of by plea in abatement only. (*c*)

And by the 3 & 4 Wm. IV. c. 42, s. 8, it is provided, that no plea in abatement for non-joinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the Court, and unless the place of residence of such person shall be stated with sufficient certainty in affidavit verifying such plea; and the plaintiff may reply the discharge of such person by bankruptcy and certificate, or under the Insolvent Act.

3 & 4 Wm.
IV. c. 42, s. 8.

The action of covenant is either local or transitory, according as it is founded upon the privity of contract, or privity of estate. (*d*) For wherever it is founded upon privity of contract, there it may be brought in any county, without respect to the particular situation of the lands demised, agreeably to the maxim *debitum et contractus sunt nullius loci*. (*e*) The lessor may, therefore, sue the lessee, and the lessee sue the lessor in any county. (*f*) And the statute 32 Hen. VIII. c. 34, having transferred the privity of con-

Venue,
when transitory.

(*y*) As to the averment see Petrie

v. Bury, *supra*, p. 259.

(*z*) *Eccleston v. Clipsham*, 1

Wms. Saund. 154. n. (1). *Cabell*

v. Vaughan, *ibid.* 291. n. (4.)

(*a*) *Ibid.*

(*b*) *Ibid.*

(*c*) *Ibid.*

(*d*) *Vide Selw. N. P.* 499, 9 edit.

(*e*) *Bulwer's case*, 7 Rep. 57. *a.*

(*f*) *Ibid.* 2. *a.*

tract to the assignee of the reversion, in respect of express covenants running with the land, (*f*) for all such covenants the assignee of the reversion stands precisely in the same situation as the lessor; and may, in like manner, sue or be sued by the lessee in any county. (*g*) And upon this principle of the transitory nature of contracts, wherever the action arises upon privity of contract, covenant may be maintained in any county in England in respect of lands lying in Ireland, the West Indies, &c. (*h*)

An action of assumpsit for breach of an implied covenant to keep the demised premises in repair, is transitory, and not local. (*i*)

When local.

But when the action arises by mere force of privity of estate, the action is local, and must be brought in the county where the lands lie, and not in any other county, though the lease may have been made there. (*k*) The lessor, therefore, can sue the assignee of the lessee, and the assignee of the lessee can sue the lessor, in such particular county only, because no other privity than that of estate exists between these parties. (*l*) And as the assignee of the reversion is, as has been before observed, in the same situation as the lessor, it follows that the same rule applies to him; and that consequently all actions of covenant by the assignee of the reversion against the assignee of the lessee, and by the assignee of the lessee against the assignee of the reversion, are local. (*m*) And when rent is reserved payable in the county of A. out of lands situate in the county of B., the venue must be laid in B. (*n*)

(*f*) *Supra*.

(*g*) *Thursby v. Plant*, 1 Saund. 237. S. C. 1 Lev. 259. 1 Sid. 401. 2 Keb. 439, 492; and by the name of *Nuristie v. Hall*, 1 Ventr. 10. *Thrale v. Cornwall*, 1 Wils. 165.

(*h*) *Wey v. Yalley*, 6 Mod. 194. S. C. 2 Salk. 651. 3 Salk. 381. Holt, 705. *Sheirs v. Bretton*, Cro. Jac. 446. And see *Mostyn v. Fabrigas*, Cowp. 161, 181.

(*i*) *Beckwith v. Simpson and another*, 1 C., M. & R. 834.

(*k*) *Ibid.* *Barker v. Damer*, Salk. 80. S. C. Carth. 183. Show. 191. 3 Mod. 336.

(*l*) *Stevenson v. Lambard*, 2 East, 580. *Berwick (Mayor) v. Shanks*, 11 Moore, 372.

(*m*) *Barker v. Damer*, *sub. sup.*

(*n*) *Ibid.* *Bord v. Cudmore*, Cro. Car. 183.

But in all these cases, the defect in the venue must be taken advantage of in the first instance by demurrer, because such defect is cured by verdict, by force of the statute 16 & 17 Car. II. c. 8. (o)

And by the 3 & 4 Wm. IV. c. 42, s. 22, reciting that unnecessary delay and expense is sometimes occasioned by the trial of local actions in the county where the cause of action has arisen; it is enacted, that in any action depending in any of the superior Courts, the venue in which is by law local, the Court in which such action shall be pending, or any judge of the Court may, on the application of either party, order the issue to be tried or the writ of inquiry executed in any other county or place than that in which the venue is laid, and for that purpose may order a suggestion to be entered on the record, that the trial may be more conveniently had or writ of inquiry executed in the county or place where the same is ordered to take place.

3 & 4 Wm.
IV. c. 42, s. 22.

It is unnecessary to set forth the lessor's title in the declaration, it being sufficient to state that *he was possessed* of the premises, &c. (p)

Lessor's title
need not be
set forth.

The declaration in covenant must expressly shew that the writing upon which the action is brought was *a deed*, indented or polled. (q) Therefore, when the pleadings were in Latin, it was held to be insufficient to say *per quoddam scriptum suum factum apud W.*, because *scriptum* did not signify a deed, and *factum* could be there only taken as an adjective; though it was agreed that *factum* taken as a sub-

Averment
that lease was
by deed.

(o) *Bailiffs, &c., of Litchfield v. Slater, Willes, 431. Mayor, &c., of London v. Cole, 7 T. R. 583.* In a case where a view was necessary, the Court of King's Bench, changed the venue in an action of covenant to the country where the premises lay, though most of the plaintiff's witnesses resided in

the county where the venue was laid. *Hodidnot v. Cox, 8 East, 268.*

(p) *Gold v. Barnsley, Cart. 30. Parker v. Harris, 4 Mod. 76. Scilly v. Dally, 2 Salk. 562.*

(q) *Southwell v. Brown, Cro. Eliz. 571. Penson v. Hodges, ibid. 737.*

stantive, or *indentura*, or *scriptura indentata*, would have been good ; and that these expressions would imply the fact of sealing and delivery. (r)

Profert.

The plaintiff is moreover bound to bring the deed, upon which the defendant is to be charged, before the Court, in order to shew that it is sufficient in law, and not made defeasible upon condition ; and that it is duly sealed by the covenantor, and is not razed or interlined in any material part. (s) The declaration must, therefore, make *profert* of the original deed, or such part of it as bears the defendant's seal. (t) If, however, the plaintiff be unable to produce the deed, he may state the particular reason for its non-production, and so excuse himself from making *profert* ; as that the deed is in the hands of the adverse party ; (u) that it remains in another court ; (v) that it has been destroyed by fire, (w) or lost by time or accident. (x) But if the plaintiff make *profert*, he is then bound to produce the deed ; and cannot be admitted to give evidence of its loss or detention ; (y) or if after *profert*, the defendant craves oyer, the plaintiff cannot then excuse himself for the non-production of the original, and substitute a copy. (z)

If the lease were *delivered* upon a different day from that of which it bears date, this must be specially averred ; for every deed will be taken *prima facie* to have been executed and delivered upon the day on which it is dated. (a)

(r) *Moore v. Jones*, *Ld. Raym.* 1536. *S. C. Str.* 814.

(s) *Co. Lit.* 35. *b.* Doctor Leyfield's case, 10 *Rep.* 92. *a.*

(t) *Yelverton v. Cornwallis*, *Noy*, 53. *Thoresby v. Sparrow*, 1 *Wils.* 16. *S. C. Str.* 1186.

(u) *Wymark's case*, 5 *Rep.* 75.

(v) *Ibid.*

(w) *Dr. Leyfield's case*, *ub. sup.* *Routledge v. Burrell*, 1 *H. Bl.* 254.

(x) *Read v. Brookman*, 3 *T. R.*

151, *dissentiente Grose, J.*, and see *Rawlinson v. Stone*, 3 *Wils.* 3. *Whitfield v. Fausset*, 1 *Ves.* 387, and *Rex v. Marsh*, *Anstr.* 193.

(y) *Smith v. Woodward*, 4 *East*, 585.

(z) *Totty v. Nesbit*, cited 3 *T. R.* 153. *Matison v. Atkinson*, *ibid.* n. But where oyer is craved, the Court will allow the plaintiff to amend his declaration. *Ibid.*

(a) *Stone v. Bale*, 3 *Lev.* 348.

A declaration in covenant stated that the deed was *indented, made, and concluded*, on a day subsequent to the day on which the deed was stated on the face of it to have been *indented, made, and concluded*; it was holden that such allegation was no more inconsistent with the deed than if it had been alleged that it was sealed and delivered on a day subsequent; that it was quite immaterial when it was *indented*, and equally so when it was *made*, by which might be understood when it was *written*. The only material word was *concluded*, and a deed could only be said to be *concluded* when it was delivered. The time of delivering was the important time when it took effect as a deed; and from the preceding case of *Stone v. Bale*, it appeared that the delivery might be after the date. (b)

The lease should then be set out in the declaration, and as it is introduced merely by way of recital, it is unnecessary to plead it *directly*, or in its very terms; but it may be introduced by a *testatum existit*, (as that "by a certain indenture it was witnessed,") and be set forth according to its *substance and legal effect*. (c) Such parts only should be introduced as are necessary to entitle the plaintiff to recover; and all covenants, upon the breach of which the plaintiff does not mean to rely, should be omitted. For not only do unnecessary recitals put the party in danger of nonsuit by means of a variance: but, where impertinent matter is introduced, the Court will refer it to the officer to be struck out at the cost of the party introducing it. (d)

Recital of the lease.

Therefore, in an action of covenant for nonpayment of rent, it is sufficient to allege in the declaration that the plaintiff, on such a day and year, at such a place, by a certain indenture made between him of the one part, and the defendant of the other part (which the plaintiff brings

Form of declaring.

(b) *Hall v. Cazenove*, 4 East, 477. Car. 188. S. C. Sir W. Jones, 223.

(c) *Penning v. Lady Platt*, Cro. Jac. 383. *Bultivant v. Holman*, *ibid.* 537. *Bachelour v. Gage*, Cro. 667. *Dundass v. Lord Weymouth*, Cowp. 665. *Price v. Fletcher*, *ibid.* 727.

(d) *Bristow v. Wright*, Doug.

here into Court,) demised to the defendant, *certain premises particularly mentioned and described in the said indenture*, (instead of setting out the parcels,) except as therein is excepted, to hold the same to the defendant, except, &c., for a certain term therein mentioned and still unexpired, yielding the rent of *l.* payable on, &c., and then state the covenant for nonpayment of the rent, the entry of the defendant, and the breach in not paying so much rent due. Or if the action be for the breach of any other covenants, the plaintiff may merely state *at a certain rent payable by the defendant to the plaintiff, as in the said indenture is mentioned*, and then set forth such covenants and the breach of them. (e)

If the declaration professes to set out the terms of the rent, it is a variance to omit an exception referring to a subsequent proviso by which a deduction is to be made in a given event. (f)

In an action of covenant it does not seem necessary to shew when the rent fell due, and a mistake in the statement would, it seem, be immaterial, but such is not the case in debt. (g)

Where there is a proviso or condition which goes in defeasance of the covenant, it is unnecessary for the plaintiff to insert it; for it ought to come from the other side. (h) As where the plaintiff declared that the defendant covenanted to deliver to him 1500 measures of salt-petre before such a day, and that he had not done it; the defendant prayed oyer of the deed; in which the covenant was as alleged *provided that if any misfortune happen by fire or water to disable him, he shall be excused*; and pleaded that he was disabled by fire. On issue joined thereon, and verdict for the plaintiff, it was moved, in arrest of judgment, that there

(e) 1 Wms. Saund. 233. n. (2.)

Turner, 4 B. & C. 157.

(f) Vavasour v. Ormrod, 6 B. & C. 430.

(h) Hotham v. E. I. Company, 1 T. R. 640, 645. See *vide* Vavasour

(g) See Chitty on Plead. Vol. II. p. 360, 6 edit. and Henniker v.

v. Ormrod, *supra*.

was a variance between the deed upon which the plaintiff declared and that produced in Court, for one is *absolute* and the other *conditional*: but judgment was given for the plaintiff, for he need not declare upon any more of the deed than the covenant; and it is the defendant's business to shew the proviso which goes in defeasance of the covenants. (i)

If the plaintiff assumed to recite so much of the indenture as sets forth *the consideration*, a misrecital would, prior to the 9 Geo. IV. c. 15, have been fatal. As where the declaration stated, that by a certain indenture, between the plaintiff and defendant, it was witnessed, among other things, that *as well* for and in consideration of a sum of money already expended, in erecting certain furnaces by the plaintiff, the defendant did demise, &c.; and it appeared that the consideration was *as well* in consideration of a sum of money already expended, &c., *as also in the erecting and building ten dwelling houses for workmen, and also for and in consideration of the yearly rent, &c.*, the said defendant did demise; *Richards*, C. B., having nonsuited the plaintiff, upon the ground that this was a fatal variance, variance. the Court of King's Bench held that the nonsuit was right. (k)

In like manner a variance in the setting forth of the demised premises would have been fatal. Thus, where the declaration stated the demise to be of a wharf and *storehouses*, and the word in the deed was *storehouse*, it was held to be a fatal variance, though the breach of the covenant had no reference to this part of the premises demised. And *Bayley*, J., said, "I have always understood the rule to be, that a variance is fatal, unless it be in a matter which the Court would have directed to be struck out on motion, for then it might be rejected as surplusage." (l)

So where the declaration described the land demised to be

(i) *Elliott v. Blake*, 1 Lev. 88.
S. C. Sir T. Raym. 65.

(k) *Swallow v. Beaumont*, 2 B.
& A. 765. 1 Chitt. Rep. 518.

(l) *Hoar v. Mill*, 4 M. & S. 470.
But see *Hamborough v. Wilkie*,
cited *ibid.* 474. n. (a).

in the *parish* of B. and M., and the deed described them as being in the *parishes* of B., and M., the Court of Common Pleas held the variance fatal. (m)

A variance in setting forth the covenants would also have been fatal.

Thus, where the declaration set forth the demise by indenture, and stated that the defendant thereby covenanted to under-ground-gutter the *Cellar Beer* field and it appeared by the deed that he had covenanted to under-ground-gutter the *Aller Beer* field, the Court held that the word could not be rejected as surplusage, and that therefore the variance was fatal. (n)

But where a lease of a colliery granted to the lessee liberty to make pits, shafts, levels, and *soughs*, and the declaration stated it to be, at liberty to make pits, shafts, levels, and *sloughs*, the Court of Common Pleas held, that this must be considered as a mis-spelling of the word *soughs*, which, being found in company with the other words, *pits, &c. noscitur á sociis* ; and that therefore the variance was immaterial. (o)

9 Geo. IV.
c. 15.

The remedial statute of the 9 Geo. IV. c. 15, has been already noticed, by which the Court is enabled to rectify the pleadings on payment of costs. (p)

Where one entire covenant is restrained or qualified, and the declaration states it as a general covenant in absolute terms, without the qualifying context, this will be an untrue statement of the deed in substance and effect: (q) thus a covenant to repair "at all times, when, where, and as often as occasion should require during the term, *at furthest within three months after notice*," is one covenant; and cannot be stated as an absolute covenant to repair at all times,

(m) *Morgan v. Edwards*, 2 Marsh. 96, 201. S. C. 6 Taunt. 394.

(n) *Pitt v. Green*, 9 East, 188.

(o) *Morgan v. Edwards*, *supra*.

(p) *Supra*.

(q) *Howell v. Richards*, 11 East, 633, cited *ante*, p. 177.

when, where, and as often as occasion should require during the term. (q)

So where a covenant to repair contains an exception in case of fire, it is fatal if such exception be omitted. (r)

Where in an action of covenant, a defendant craves oyer of the deed, and sets it out, and pleads *non est factum*, the deed so set out becomes a part of the declaration, and the only question at the trial upon that issue, is, whether the deed set out was executed by the defendant. (s)

It has been the usual course, after setting forth the demise, to state that the lessee, by virtue of the said demise, entered into the said premises, and was possessed thereof. As long as it remained *vexata quæstio* whether the liability of the assignee attached before entry, the averment was perhaps retained generally, because in some cases it might have been deemed necessary; but it being now fully established that an assignee is liable immediately after assignment and before entry, such averment is no more necessary in the case of an assignee than in the case of a lessee. (t)

Averment of
lessee's entry.

Where the plaintiff complains of a breach of covenant, the performance of which covenant depends upon a *condition precedent*, it is necessary to the maintenance of his action that he shew what will amount to a performance of such condition. An attempt to arrange such covenants under technical heads, and to divide them into *mutual, concurrent, precedent, dependent*, and the like, has induced great confusion in the books upon this subject. (tt)

Performance
of dependent
covenants,

It has, however, been truly said, "that there are no pre-

(q) *Horsefall v. Testar*, 7 Taunt. 385. S. C. 1 B. Moore, 89. And see *Roe dem. Goatly v. Paine*, 2 Camp. 520, and *Wood v. Day* 1 B. Moore, 389, cited *ibid*.

(r) *Browne v. Knill*, 2 B. & B. 395.

(s) *Snell v. Snell*, 4 B. & C. 741.

(t) *Vide Williams v. Bosanquet*, 1 B. & B. 238, and the cases there cited. *Sed vide Chitty on Pleading*, Vol. II. 364, 6 edit.

(tt) See *Platt on Covenants*, 70. Selw. N. P. p. 505, 9 edit.

cise technical words required in a deed to make a stipulation a condition *precedent* or *subsequent*; neither does it depend on the circumstance whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant. For the same words have been construed to operate as either the one or the other, according to the nature of the transaction. The merits, therefore, of the question must depend on the nature of the contract, and the acts to be performed by the contracting parties, and the subsequent facts disclosed on the record, which have happened in consequence of this contract. (u)

or conditions
precedent,

Where, therefore, it appears by the lease to have been the intention of the parties that the performance of the defendant's covenant should be preceded by the performance of some act by the plaintiff, or any other person, so that the right of action could only commence thereupon, this is a *condition precedent*; and the plaintiff in his declaration must aver performance, or shew some sufficient cause of excuse. (v)

In covenant by the lessor against the lessee for *not repairing*, the declaration, stated that by indenture the defendant covenanted to repair the demised premises, and at the end of the term to surrender up the same in good repair, the lessor finding timber sufficient for such repairs; the defendant pleaded, that the plaintiff had not found sufficient timber; and upon demurrer, it was adjudged that the finding of the timber was a thing in its nature necessary to be done first, and, therefore, a condition precedent, the performance of which ought to have been averred in the declaration. (w)

In a lease for seven years containing the usual covenants that the lessee should pay the rent, keep the premises in re-

(u) *Per* Ashhurst, J., in *Hotham v. East India Company*, 1 T. R. 645. Lord Kenyon, *ad idem*, 6 T. R. 668: and see Serjt. Williams's note to *Pordage v. Cole*, 1 Saund. 320. n. (4.) and to *Peters v. Opie*,

2 Saund. 352. n. (3.)

(v) *Ughtred's case*, 7 Rep. 74. *Thorpe v. Thorpe*, Salk. 171. *Kington v. Preston*, cited Dougl. 689.

(w) *Thomas v. Cadwallader*, Willes, 496.

pair, &c., there was a proviso that the lessee might determine the term at the end of the first three or five years, giving six months' previous notice, and that then from and after the expiration of such notice, and payment of all rents and duties to be paid by the lessee and performance of all his covenants until the end of the three or five years, the indenture should cease and be utterly void, it was held that the payment of rent and performance of the other covenants were conditions precedent to the lessee's determination of the term at the end of the first three years, and that his merely giving six months' notice, expiring within the first three years, was not sufficient for that purpose. (*x*)

In like manner where the performance of the plaintiff's covenant appears to constitute the whole consideration of the defendant's covenant, the former is in the nature of a *condition precedent*, and performance of it must be averred. (*y*) In respect of which a material distinction exists between cases where the covenant goes to the *whole consideration*, and where it only goes to *part*. In the first case, performance must be averred. But where the covenant of the plaintiff goes only to *part* of the consideration of the defendant's covenant, and a breach of such covenant may be paid for in damages, it is not a condition precedent, but an independent covenant; and an action may be maintained by the plaintiff for a breach of the defendant's covenant without averring performance in the declaration. (*x*)

or of covenants that are the whole consideration of the defendant's covenants,

Where the defendant's covenant is made *wholly* in consideration of the plaintiff's covenant, and both are to be performed *at the same time*, performance, or at least an offer to perform, on the part of the plaintiff must be averred. (*a*)

(*x*) *Porter v. Shephard*, 6 T. R. 665.

(*y*) *Ughtred's case*, 7 Rep. 74. *Thorpe v. Thorpe*, Salk. 171. S. C. Lutw. 250. Com. Rep. 98. Ld. Raym. 235, 662. *Duke of St. Albans v. Shore*, 1 H. Bl. 270. *Large v. Cheshire*, 1 Ventr. 147.

(*z*) *Boon v. Eyre*, Bl. Rep. 1312. S. C. 1 H. Bl. 273. n. (*a*). *Campbell v. Jones*, 6 T. R. 573.

(*a*) *Glazebrook v. Woodrow*, 8 T. R. 366. *Heard v. Wadham*, 1 East, 619. And see 1 Wms. Saund. 320. n. (4.)

But where a covenant is part only of the consideration it is not a condition precedent but an independent covenant. (b)

Where, however, the defendant's covenant is *wholly* in consideration of the plaintiff's covenant, but the covenant of the plaintiff is to be performed at a period *subsequent* to the performance of that of the defendant, an averment of performance is unnecessary. (c)

And when it appears that the mutual covenants of the plaintiff and defendant are wholly independent of each other, and that either party has covenanted to perform, or abstain from a certain act, without reference to the conduct of the other, an averment of performance will be not only unnecessary but improper. (d)

must be averred generally.

In averring performance, the plaintiff must shew to the Court with certainty that he has exactly complied with the very intent of the covenant to be by him performed. (e) This, however, he may do in general terms, without alleging particularly how he performed it. (f)

The averment of performance, however, may be rendered unnecessary by the conduct of the defendant, in either discharging or hindering the plaintiff from the execution of the covenant. In either of which cases the plaintiff must expressly aver that, *being ready and willing, and offering*, to perform his covenant, he was, either by the negligence, refusal of permission, or other act of the defendant, prevented from complying therewith; or that the defendant altogether dispensed with it, and discharged him from its performance. (g)

(b) *Carpenter v. Crosswell*, 4 Bing. 409.

(c) *Thorpe v. Thorpe*, *sup.* *Russen v. Coleby*, 7 Mod. 236.

(d) *Ibid.* *Dawson v. Myer*, Str. 712. *Campbell v. Jones*, 6 T. R. 570.

(e) *Com. Dig. Pleader*. (C. 59, 60.)

(f) *Ibid.* (C. 61.)

(g) *Scot v. Mayn*, Cro. Eliz. 450. *Jones v. Barkley*, Dougl. 684. *Hotham v. East India Company*, 1 T. R. 638. *Smith v. Wilson*, 8 East, 443.

In all cases where performance, or that which is equivalent to performance, ought to be alleged, the defendant may take advantage of its omission by demurrer, if the condition precedent appear upon the face of the pleadings: or he may specially plead the non-performance of such condition in bar of the plaintiff's action. That is, where the covenant of plaintiff goes to the *whole* consideration of the defendant's covenant. For if it go only to part, he cannot make its non-performance a matter of defence; but will be left to bring his cross action against the plaintiff for the breach of his covenant. Thus, where A. by deed conveyed to B. the equity of redemption of a plantation in the *West Indies*, together with the stock of negroes upon it, in consideration of 500*l.* and an annuity of 160*l.* for life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and B. should quietly enjoy; and B. covenanted that A. *well and truly performing all and every thing therein contained* on his part to be performed, he would pay the annuity; in an action by A. against B. on this covenant, the breach assigned was the non-payment of the annuity. Plea, that A. was not at the time *legally possessed of the negroes* on the plantation, and so had not a good title to convey. The Court of King's Bench, on demurrer, held the plea to be ill, and added, that if such plea were allowed, any one negro, not being the property of A., would bar the action. The *whole* consideration of the covenant on the part of B., the purchaser, to pay the money, was the conveyance by A. the seller to him of the *equity of redemption* of the plantation, and also the *stock of negroes* upon it. The excuse for non-payment of the money was, that A. had broke his covenant as to part of the consideration, namely, the stock of negroes. But as it appeared that A. had conveyed the equity of redemption to B., and so had in part executed his covenant, it would be unreasonable that B. should keep the plantation, and yet refuse payment because A. had not a good title to the negroes. (a) Besides the damages sustained by

Consequences
of omission.

(a) *Boone v. Eyre*, Bl. Rep. 1312.

the parties would be unequal, if A.'s covenant were held to be a condition precedent; for A. on the one side would lose the consideration money of the sale, but B.'s damage on the other might consist perhaps in the loss only of a few negroes. (i)

Where there is a negative covenant on one side, in consideration of which there is an affirmative covenant on the other, the breach of the negative covenant is no answer to an action for the non-performance of the affirmative covenant. As if A. covenant not to do a certain thing, in consideration whereof B. covenants to give him 100*l.*; this covenant of A. (though it be expressed to be the consideration of B.'s covenant) is not a condition precedent; because a negative covenant is not to be performed until it becomes impossible to break it. (k)

Averment of request.

When it appears that the defendant's covenant is to do a certain act *upon request*, the request is in the nature of a condition precedent: and the plaintiff must specially aver that the defendant has been duly requested to do such act; otherwise the declaration will be bad on a general demurrer, or even after the verdict. (l) If, however, it appear that the defendant has rendered it impossible that his covenant should be performed, it seems that an averment of request is unnecessary: as where defendant covenanted to grant a lease of certain buildings to the plaintiff, *upon request*, and the plaintiff, without averring any request assigned as a breach that the defendant did not grant him a lease, but then and there pulled down the buildings. (m)

Besides the averment of performance of particular covenants, it seems formerly to have been usual for the plaintiff to make a general averment of performance of all covenants

(i) *Per* Ashburst, J., 6 T. R. 573.

(k) *Hunlocke v. Blacklowe*, 2 Saund. 156. Platt on Covenants, 20.

(l) *Birks v. Trippet*, 1 Saund. 32. *Selman v. King*, Cro. Jac. 183. Hill

v. Wade, *ibid.* 523. Selw. N. P. 111 9th edit.

(m) *Lambert v. Lane*, Latw. 306. *Sed quare.*

by him to be performed. (n) This is mere form, and is now generally disused. (o)

The declaration must assign a breach, and shew with certainty and exactness that the covenant upon which the action is brought has been broken. (p) This must follow the terms, or, at least, the import and effect, of the covenant; for if it be wider or narrower than the covenant, it will be bad. (q) If the covenant be in the disjunctive, the breach should likewise be so; as if it be that the defendant or his executors will repair, the breach must be that neither he *nor his executors* did repair. (r) If the covenant be general, the breach may also be general; and where it can be done with certainty and precision, it is sufficient to negative the words of the covenant. (s) If the breach be improperly assigned, the defendant may demur generally. (t) But it will be aided after verdict. (u) And if there be a breach well assigned, and another ill, the plaintiff on demurrer to the entire declaration shall have judgment for the breach well assigned, and shall be barred for the residue. (v) Where the action is against the original lessee, the breach need not extend to assigns. Therefore, where an agreement was set out in the declaration to convey to H. and his assigns, and the breach was that the defendant did not convey to H., it was holden good. (w) But where the co-

Assignment
of breach;

(n) See *Thursby v. Plant*, 1 Saund. 234. *b.* 235.

(o) *Hill v. Thorn*, 2 Mod. 309. *Jodderell v. Cowell*, Ca. temp. Hardw. 343, *see vide* Chit. on Plead. Vol. II. p. 364, 6th edit.

(p) Com. Dig. *Pleader*, (C. 45, 48.)

(q) *Ibid.* (C. 46, 47.)

(r) *Ibid.* (C. 45.) *Colt v. Howe*, Cro. Eliz. 348.

(s) *Robert Bradshaw's case*, 9 Rep. 60. *b.* S. C. *Salman v. Bradshaw*, Cro. Jac. 304. *Knight v. Keech*, Skin. 344. *Brigstock v. Stanion*, Ld. Raym. 106. *Procter*

v. Burdet, 3 Lev. 170. S. C. 3 Mod. 69. *Rawlins v. Vincent*, Carth. 124.

(t) Com. Dig. *Pleader*, (C. 44.) *Knight v. Keech*, Skin. 344.

(u) *Ibid.* (C. 48.) *Anon.* Sir T. Jones, 125. *Kirby v. Hansaker*, Cro. Jac. 315.

(v) *Bressy v. Humphreys*, Cro. Jac. 557. *Pinkney v. Inhabitants of East Hundred*, 2 Saund. 380. Com. Dig. *Pleader*, (C. 32, 48.)

(w) *Gyse v. Ellis*, Str. 228. *Smith v. Sharp*, 5 Mod. 133. S. C. 1 Salk. 139.

tenant is, that A. or his assigns shall do an act, the breach, it has been held, must be, that neither A. nor his assigns did such act. (x) And, yet, in covenant for non-payment of rent, a breach that the defendant has not paid, without saying "or his assigns," was held good, for the Court would not presume an assignment. (y)

of covenant
for payment
of rent,

Where a covenant for the payment of rent is, that the lessee will "*pay or cause to be paid*," it is unnecessary to assign the breach in the disjunctive. For where the covenant was "*to pay or cause to be paid to them or any of them*," and the breach assigned was, that the defendant "*did not pay to them*," it being objected that the breach was too large, and did not exclude both ways by either of which the act covenanted for might have been done; that though the plaintiffs say, the defendant did not pay, yet he might have *caused to be paid*; and though they charge a non-payment to all, yet there might be a payment to one of them;—the objection was over-ruled; for the Court said, that he who causes to be paid, pays: and if the defendant had paid one, he might have pleaded it in his discharge. (x)

In covenant the plaintiff declared that the defendant covenanted to pay yearly during the plaintiff's life, at the two feasts of Michaelmas and Lady-day, 3*l.* 6*s.* 8*d.* by equal portions; and for breach assigned that 3*l.* 6*s.* 8*d.* for a year at Lady-day last was in arrear, and unpaid. The defendant demurred; and objected that it did not appear when the money became due; for it might be behind and unpaid at Lady-day, and yet might become due at Michaelmas or the Lady-day before. But the Court held this well enough upon a general demurrer, and gave judgment for the plaintiff. (a) And in a subsequent case, where one of five tenants in common assigned for breach that on the 24th June, 1824, a large sum of money, to wit, &c., one-fifth part of the rent

(x) *Ibid.*

(y) *London (Mayor, &c.) v. Tench*,
Bull. N. P. 164.

(z) *Aleberry v. Walby*, Str. 229.

(a) *Stagg v. Hind*, 1 Salk. 139.

for three quarters of a year of the term then *elapsed* became due, this was held good upon special demurrer. (b)

Where rent is alleged to have become due upon an impossible day, it may be rejected as surplusage. (c)

In an action of covenant, the breach assigned was, "that the defendant had not since the said 25th of March used the demised premises, or any part thereof, in a good and husbandlike manner, *but on the contrary* thereof had committed, permitted, and suffered to be made, done, and committed in and upon the said demised premises, great waste, spoil, and destruction." The defendant pleaded "that he had not committed, &c.; any waste, spoil, or destruction upon the said premises, but used the same in a good and husbandlike manner, &c.," on which issue was taken. At the trial at the *Worcester* assizes, before *Heath, J.*, evidence was offered to shew that the defendant had not managed the farm in an husbandlike manner; for that he had not sown any clover or turnips on a certain proportion of the farm according to the course of husbandry in that country: but the learned judge, being of opinion that, as the lease was not expired, this was not *spoil or destruction*, and that upon this issue it was not competent to the plaintiff to prove that the farm was used in an unhusbandlike manner, nonsuited the plaintiff. A rule having been obtained to shew cause why the nonsuit should not be set aside, and a new trial granted, *Buller, J.*, without hearing any argument, said, that although on the former words of the breach the evidence would have been inadmissible, yet as the plaintiff had in the subsequent part of it narrowed it to waste, spoil, and destruction, it was not competent to him to give evidence of any other particulars which did not come within the meaning of those words; and the rest of the Court being of that opinion, the rule was discharged. (d)

of covenant
to cultivate,

(b) *Henniker v. Turner*, 4 B. & C. 157.

(c) *Buckley v. Kenyon*, 10 East, 139.
(d) *Harris v. Mantle*, 3 T. R. 307.

Where the covenant stipulated that the tenant should pay an increased rent for every acre converted into tillage, and the jury gave a verdict for the estimated damage instead of the increased rent, the Court granted a new trial. (e)

of covenant
to repair.

In covenant to leave a house in repair, it was held sufficient to follow the words of the covenant, and to state "*that the defendant did not leave the house in repair,*" without shewing in what particular it was not repaired. (f)

Averments;

These observations apply to all declarations in covenant; but where the action is between persons claiming under particular titles, particular averments are necessary to the plaintiff's declaration.

by tenant for
life;

pur autre vie;

by one claim-
ing under
tenant in tail;

Where an estate is derived from tenant in fee-simple, whether absolute, or qualified, as bishop, dean, or the like, the law intends a continuance of the estate if the contrary do not appear, and, therefore, it needs not be averred: but where the estate is derived from one who has only a particular estate as for life, the continuance of such estate must be averred; for the law does not intend the continuance of the life without an averment. (h) So in an action by the lessor, tenant *pur autre vie*, the life of the *cestui que vie* must be averred. (i) There is a difference of opinion whether a person who claims under *tenant in tail* is bound to aver the life of tenant in tail and the continuance of the estate tail. In *Plowden*, (k) it is said that, when a lease is derived from tenant in tail, the inheritance shall be intended to continue in him, and he in the inheritance, until the contrary is shewn; and so it has been adjudged in several cases. (l) On the other hand, it is laid down that whoever claims under tenant

(e) *Farrant v. Olmius*, 3 B. & A. 692.

(f) *Hancock v. Field*, Cro. Jac. 171.

(h) *Smith v. Stapleton*, Plowd. 431. a.

(i) Co. Lit. 303. Englefield's

case, *Moore*, 306, 335. *Colthurst v. Bejushin*, Plowd. 31. a.

(k) 431. a.

(l) *Cockman v. Farrer*, Sir T. Jones, 181, *Weeks v. Peach*, Lutw.

1226. *Bjrdal v. Carew*, cited *ibid*.

in tail ought to aver the life of such tenant in pleading. (m) But, according to Serjt. *Williams*, "the better opinion seems to be, that it is not necessary to aver the life of tenant in tail, or the continuance of the estate tail. For if tenant in tail makes a lease which is warranted by statute 32 Hen. VIII. c. 28, though the lease is only binding upon the issue in tail, and consequently does not bind those in remainder or reversion, but determines on the death of tenant in tail without issue; yet it seems clear that the lessee need not aver the continuance of the estate tail, but it shall be intended to continue until the contrary is shewn. Moreover, though the lease is *not* made conformable to that statute, yet it is not *void*, but only *voidable* by the issue in tail; and therefore it seems not necessary to aver the life of tenant in tail. So where tenant in tail grants his estate to another in fee by an assurance not enrolled as required by the 3 & 4 Wm. IV. c. 74, the grantee has a fee-simple, determinable by the entry of the issue in tail; and therefore it is submitted that the grantee is not bound to aver the life of tenant in tail, or the continuance of the estate tail. In a word, tenant in tail has an estate of *inheritance* which may continue for ever, and all his grants are only voidable, and not void; whereas tenant *for life* cannot grant an estate for a longer period than his own life; and, if he does, the estate granted is absolutely *void* upon his death." (n)

But though a person, who derives title under tenant for life, or *pur autre vie*, must aver the life of tenant *for life* or *cestui que vie*, yet it seems to be unnecessary to make an *express* averment thereof. It is held, that if it appear by *implication* that the life continues, it is sufficient; at least after verdict, or on a general demurrer. (o) As where one who claims under a rector, says that the rector was *and yet is seised*, it is a sufficient averment of his life. (p) And so

(m) Bro. Abr. *Pleadings*, 24.—
Estates, 18. Co. Lit. 303. b. 362. b.

(n) 1 Wms. Saund. 235. n. (8.)

(o) *Ibid.*

(p) Anon. Dyer, 304. a. Walfer
v. Bold, Noy, 70. Scamler v. John-
son, Sir T. Jones, 227.

where the plaintiff, lessee for years from a tenant for life, states in his declaration that he was *and still is* possessed, this is held to be a sufficient averment of the life of tenant for life. (q)

In replication in trespass, an averment that a lease from year to year from A., who held under a lease from year to year from B., was a demise for one year, and so from year to year, so long as the defendant and A. should respectively please, during the continuance of the demise from B. to A., was held to describe the demise to the defendant according to its legal effect. (r)

by husband
seised jure
uxoris ;

Where the husband is seised in right of his wife, it must be averred *that plaintiff and his wife are seised in their demesne as of fee in right of the wife* ; for if the husband plead that he *alone* is seised in his demesne as of freehold, or as of fee in right of his wife, it will be bad upon a special demurrer. (s) Therefore, where in covenant the declaration stated that W. S. was seised in fee, and being so seised granted the lease on which the action was brought, and upon his death the reversion descended upon J., the plaintiff's wife as heir at law, whereupon the plaintiff became and was seised *of the said reversion in his demesne as of freehold in right of the said J. his wife* ; the Court upon a special demurrer held the declaration bad. (t)

But where in covenant the plaintiff declared that he was seised in fee, and that by indenture made between the plaintiff and *Elizabeth* his wife *ex una parte*, and the defendant of the other part, *testatum existit*, that the plaintiff and his wife demised ; it was objected that it being shewn that the husband was sole seised, the husband and wife could not demise : *sed non allocatur* ; for it is not affirmed, but only

(q) Anon. 1 Brownl. 4. Thompson v. Withers, 2 Bulstr. 263.

(r) Pike v. Eyre, 9 B. & C. 909.

(s) Took v. Glascock, 1 Saund.

253. n. (4.) Poole v. Longueville, 2 Saund. 283. n. (1.)

(t) Polyblank v. Hawkins, Doug. 329.

that by the indenture it is witnessed, for the *testatum* is a recital of that. (u)

Where a lease was stated in the declaration to be made by the plaintiff on the one part, and T. R. on the other, but turned out on evidence to have been made by the plaintiff and his wife on the one part, and T. R. on the other, the Court of Common Pleas decided that this was no variance, the wife having had only a chattel interest before marriage. (v)

In covenant by the assignee of the reversion, the plaintiff must aver, that the reversion was assigned to him by *deed or fine*; (w) a reversion being at common law assignable by such conveyances only, (x) and he must set out the title of the lessor to the premises, that it may appear he had such an estate in the reversion as might be legally assigned to the plaintiff, (y) and if the lessor has an equitable estate only at the date of the lease, and afterwards acquires the legal estate, the assignees of the legal reversion cannot, it seems, maintain covenant. (z)

by assignee of reversion;

Where an assignment of a reversion in fee has been made by husband and wife, being seised to them and the heirs of the husband, the assignee may declare as assignee of the husband; for the estate for life of the wife is merged. (a)

by assignee of husband and wife.

In covenant by the *assignee of the term* against the lessor, it seems to be unnecessary to aver that the assignment was by *deed or writing*, at common law a term having been assignable by *parol*; though by the statute of frauds, a deed or note in writing is now made necessary. (b) If the assignee be

In the case of an assignment of the term.

(u) Woodward v. Cliff, 2 Salk. 515.

(v) Arnold v. Revoult, 1 B. & B. 443. This case has been recognized in Rennie v. Robinson, 1 Bing. 147.

(w) Long v. Nethercote, Cro. Car. 143. Beely v. Parry, 3 Lev. 155.

(x) Co. Lit. 172. a. Lincoln

College case, 3 Rep. 63. a. And see Carwick v. Blagrove, 1 B. & B.

531.

(y) 1 Wms. Saund. 233. n. (2.)

(z) Whitton v. Peacock, 2 Bing. 420. N. S.

(a) Major v. Talbot, Cro. Car. 285. S. C. Sir W. Jones, 305.

(b) Vide 1 Wms. Saund. 234. n. (3.)

plaintiff, he is bound to state in his declaration all the *mesne assignments*; and cannot aver generally that the estate came to him by assignment. (a) But in an action against an assignee such general form of pleading is sufficient, the plaintiff being a stranger to the defendant's title. (b) In declaring, however, against the assignee of a term, the plaintiff must shew that he is assignee of the *estate* of the lessee: and, therefore, it is not sufficient to say that the *tenements* came to the defendant by assignment. (c) If it appear by the plaintiff's declaration that he is the assignee of a lease by estoppel he cannot maintain covenant. (d)

By heir.

Where the plaintiff comes in by descent, and declares upon a lease made by his ancestor, he must shew that the ancestor was seised of a freehold, and then state how he is heir. (e) He must also make it appear that the breach of the covenant was in his own time; because an action for a breach in the ancestor's time belongs to the executor. (f) But in covenant for not repairing, he may aver that the premises were out of repair at such a day (in his time,) and so many years before; and though it appear that part of the years were in the life of the ancestor, yet he shall recover damages for the whole time, because the want of repairs is damage to the heir. (g) And so though the breach be in the time of the ancestor if the damage accrue to the heir. (h)

Against heir.

In an action of covenant *against* an heir, though he is only

(a) *Ibid.* 112. a. n. (1.) So the assignee of a *lease* is bound to prove the execution of the lease, and *all mesne assignments*. Crosby v. Percy, 1 Camp. 303. But in an action against a lessee by an assignee of the *reversion*, proof that the lessee has paid rent to the assignee is sufficient evidence of the assignment. Doe v. Parker, Peake Law. Evid. 267. Starkie's Evidence, Part IV. p. 74.

(b) Pitt v. Russel, 3 Lev. 19. Lovelock v. Sorrell, 8 Mod. 72. 1 Saund. 112. a. n. (1.)

(c) Huckle v. Wye, Carth. 256.

(d) Armiter v. Parkes, cited Moore, 419, and Cro. Eliz. 437.

(e) Gilb. Debt. 408. Denham v. Stephenson, 1 Salk. 355.

(f) Anon. 11 Mod. 45.

(g) Anon. 11 Mod. 45. S. C. (Vivian v. Champion,) Salk. 131.

(h) King v. Jones, 5 Taunt. 416.

chargeable in respect of assets by descent, it is unnecessary to aver that the heir had lands by descent; the contrary being properly his defence. (*g*) It is unnecessary to shew how he is heir; (*h*) and where the heir *enters* upon the land demised, he may be charged generally as assignee. (*i*)

In covenant by executors for a breach during the life-time of the testator, all must join, though some are under age, (*k*) or have not proved the will. (*l*) And so in an action against executors all must be joined; or the defendant may plead in abatement, that there are other executors, without averring that they have administered. (*m*) The executor upon the covenant of the testator can be charged as such *de bonis testatoris* only: (*n*) even though the breach be committed after the testator's death by the executor himself, the covenant being the testator's and the executor being sued in his representative capacity. (*o*)

By and against
executors.

Accordingly, where lessee for years covenanted for himself and his executors to *repair, sustain, maintain, and amend*, the house, at his and their proper costs and charges from time to time during the term, in all requisite and necessary reparations whatsoever, (*principal timber not hurt or in decay for want of repairs or otherwise by default of the lessee or his executors only excepted*), and after the death of the lessee the house was burnt by the default and negligence of the executors; it was decided that an action

(*g*) *Dyke v. Sweeting*, Willes, 585.

(*h*) *Denham v. Stephenson*, Salk. 355.

(*i*) *Derisley v. Custance*, 4 T. R. 75.

(*k*) *Foxtwist v. Tremaine*, 2 Saund. 212. S. C. 1 Sid. 449, in which case it seems the infant may sue by attorney. 2 Saund. 213. n. (6.)

(*l*) *Hensloe's case*, 9 Rep. 37.

(*m*) *Swallow v. Emberson*, 1 Lev. 161.

(*n*) *Buckley v. Pirk*, 1 Salk. 317.

(*o*) *Collins v. Throughgood*, Hob. 188. *Bull v. Wheeler*, Cro. Jac. 647. S. C. (*Bull v. Winter*), Palm. 314. *Bridgman v. Lightfoot*, Cro. Jac. 671. S. C. 2 Rol. Rep. 415. And see *Tilney v. Norris*, 1 Salk. 309, and 1 Rol. Abr. 931. l. 48. But if he plead *ne unques executor*, he will be liable *de bonis propriis* as in other cases of false pleas by executors. *Ibid. et vide supra*, p. 496.

would lie against them upon the covenant, but that damages should be awarded *de bonis testatoris* only. (*p*)

But if the executor *enter*, the plaintiff may then charge him as assignee, without naming him executor, stating generally that the estate of the lessee in the premises lawfully came to the defendant: in which case the judgment shall be *de bonis propriis*. (*q*) And so of the executor or administrator of the assignee. (*r*) But the law on this subject has been already fully explained.

If lessee assign or part with all his interest in a term, reserving a rent which the undertenant covenants to pay, the executor of the lessee may maintain an action of covenant for rent accruing during the continuance of the lessee's term. (*s*)

If in an action of covenant for *rent*, the tenant suffer judgment by default, the Court will refer it to the officer to compute the rent due, (*t*) but not so in debt on simple contract or assumpsit for use and occupation. (*u*)

Where the tenant under a lease, containing a covenant to repair, underlet the premises to one, who entered into a similar covenant, and the original lessor brought an action on the covenant in the first lease, and recovered. It was held, that the damages and costs recovered in that action, and also the costs of defending it, might be recovered as special damages in an action against the under-tenant, for the breach of his covenant to repair. (*v*)

A mere tenant at sufferance may be charged as assignee if he holds over after the expiration of the lease. (*w*)

(*p*) Anon. Dyer, 324. b. pl. 34.

(*q*) Buckley v. Pirk, 1 Salk. 317.
Tilney v. Norris, Ld. Raym. 553.
S. C. Salk. 334. Carth. 519.

(*r*) *Ibid.*

(*s*) Baker v. Gostling, 1 Bing.
19. N. S.

(*t*) Byrom v. Johnson, 8 T. R.

410. Champion v. Crawshaw, 2
Marsh. 56. S. C. 6 Taunt. 356.

(*u*) *Ibid.*

(*v*) Neale v. Wyllie, 3 B. & C. 533.

(*w*) Bromfield v. Williamson,
Style, 407.

When the demise is not by deed, but by unsealed writing, or by parol, assumpsit is the proper remedy for the landlord in case of the tenant's breach of his agreement. And, as without any express agreement, the tenant is bound to keep the premises in repair, and to cultivate the lands according to the custom of the country; if he neglect to do this, an action on the case upon his *implied promise* will lie against him, for which the bare relation of landlord and tenant is a sufficient consideration. (*v*)

II. By action of assumpsit, upon implied promise to cultivate the lands,

But the mere relation of landlord and tenant is not sufficient to raise a consideration for any extraordinary mode of agriculture; and, therefore, a declaration which stated that in consideration that the defendant had become tenant to the plaintiff of a farm, the defendant undertook to make a certain quantity of fallow, and to spend 60*l.* worth of manure every year thereon, was held bad upon demurrer: because these obligations did not arise out of the bare relation of landlord and tenant. (*w*)

An agreement by the tenant to leave a farm as he found it, is an agreement to leave it in tenantable repair if he found it so, and will maintain a declaration so laid. (*x*) An allegation that the estate was treated contrary to good husbandry, and the custom of the country is proved by shewing that it was treated contrary to the course of husbandry in the neighbourhood; as by tilling *half* the farm at once, when no other farmer tilled more than a *third*:—and it is unnecessary to shew any precise definite custom or usage in respect to the quantity tilled. (*y*)

or upon express agreement.

Where the tenant has covenanted to do any particular act, the courts of equity will in general leave the landlord to his remedies at law, and will not decree a specific performance

When equity will interfere.

(*v*) *Powley v. Walker*, 5 T. R. 373. *Kimpton v. Eve*, 2 Ves. & Bea. 353.

567. S. C. 6 Taunt. 300

(*x*) *Winn v. White*, Bl. Rep. 840.

(*y*) *Legh v. Hewitt*, 4 East, 154.

(*w*) *Brown v. Crump*, 1 Marsh.

in his favour. (s) Thus a specific performance of a covenant to repair will not be decreed ; (a) and, though it was said by Lord *Hardwicke* that, upon a covenant to build, the party was clearly entitled to come into a court of equity for a specific performance ; (b) it appears to have been the opinion of both Lord *Thurlow*, and Lord *Kenyon*, that a specific performance of such a covenant could not properly be decreed. (c) But where the tenant is about to do an act against which he has expressly covenanted, a court of equity will interfere and restrain him by injunction. (d)

If in a lease there is a stipulation that the landlord may retain the rent, or any part, on giving bond for payment of it with interest, and the rent being in arrear, the landlord brings his action for the amount, the Court will not stay proceedings on an affidavit, that since the commencement of the suit the lessee has executed and tendered to the landlord a bond for the amount of the rent in arrear with interest. (e)

(s) *Errington v. Aynesly*, 2 Br. Ch. Ca. 341. *Flint v. Brandon*, 8 Ves. 159. *Rayner v. Stone*, 2 Eden, 128, and note.

(a) *Sparkes v. Smith*, 2 Vern. 275. *City of London v. Nash*, 3 Atk. 515. S. C. 1 Ves. 12. *Hill v. Barclay*, 16 Ves. 404.

(b) *City of London v. Nash*, *sup.* And see *Anon.* 2 Freem. 253. *Allen v. Harding*, 2 Eq. Ca. Abr. 17, and *Mosely v. Virgin*, 3 Ves. 184.

(c) *Lucas v. Commerford*, 3 Br. Ch. Rep. 166. *Errington v. Aynesly*, *sup.* And see *Flint v. Brandon*, 8 Ves. 164, where Sir W. Grant, M. R., treats the question as unsettled.

(d) *Barret v. Blagrove*, 5 Ves. 555. And see further as to this in the next section.

(e) *Jones v. Winkfield* and another, 10 Bing. 308. 3 Moore & Sc. 846.

SECTION V.

OF THE LANDLORD'S REMEDIES AGAINST THE TENANT IN
CASE OF WASTE, OR OTHER INJURY TO THE ESTATE.

The remedy for waste is two-fold; preventive and corrective. At common law, a writ of *estrepement* lay *after* judgment obtained in any action real, to prevent the party against whom the judgment had been recovered, but who until execution remained in possession, from committing waste; and by the statute of Glo'ster, (g) this remedy was extended to waste pending the suit. By virtue of this writ, therefore, as soon as a real action was commenced, the sheriff might forcibly resist such persons as offered to do waste to the premises: and, if he could not otherwise prevent the mischief, imprison the wasters. Moreover, if the tenant proceeded to commit waste after the delivery of the writ, an action founded upon the writ might be proceeded in, and damages thereupon recovered. (h) In such an action it was not sufficient that the jury found for the plaintiff, and assessed the damages in a writ of waste, the verdict must expressly find the place wasted. (i) The remedy given by this statute became almost obsolete, having given place to the more ready course of application to a court of equity. (k) By the 3 & 4 Wm. IV. c. 27, real actions are abolished.

1. Means of preventing waste, by writ of estrepement.

Where the tenant is about to do an act which may operate as a permanent injury to the estate, a court of equity will interfere, and restrain him by injunction until he shall have put in his answer, and the Court shall thereupon make further

By injunction.

(g) 6 Edw. I. c. 13.

(i) Redfern v. Smith, 2 Bing. 262.

(h) 2 Inst. 328. 2 Bl. Com. 281.

(k) 3 Bl. Com. 438.

order. Therefore, if the tenant begin, or threaten, or shew an intention to commit waste, or if he be guilty of permissive waste, an injunction will be granted ; (l) and that, not merely upon the application of the immediate landlord, but it may be had by the ground landlord against the under-lessee. (m) So a court of equity will grant an injunction to restrain the tenant from an act whether it amount to waste or not, provided it be contrary to the tenant's own covenant. (n) Where the lessee covenanted not to plough pasture land, under a penalty of 20s. per annum for every acre ploughed, the Court refused an injunction; because the parties had themselves agreed upon the damage, and the compensation to be therefore made ; (o) but in a modern case, in which the breach of covenant was secured by a penalty and forfeiture of the lease, the Court granted an injunction. (p)

Where a tenant, after notice to quit, and ejectment brought thereon, made default at the trial, and then proceeded to do great mischief to the farm, the Lord Chancellor granted an injunction against his carrying off the dung, soil, compost, &c., and committing wilful waste. (q)

When upon a lease of alum works, with a covenant by the lessee to leave stock of a certain amount upon the premises, there was a fair ground to suspect that he did not mean to perform his covenant in that respect ; the Court of Chancery made a decree to prevent a breach of the covenant, which was affirmed in the House of Lords. (r)

(l) *Gibson v. Smith*, 2 Atk. 182.
Hanson v. Gardiner, 7 Ves. 308.
Mayor, &c. of London v. Hedger,
 18 Ves. 355. *Kimpton v. Eve*, 2
 Ves. & Bea. 349. *Caldwell v.*
Baylis, 2 Meriv. 408.

(m) *Farrant v. Loyal*, 3 Atk. 723.
 S. C. (mis-stated) Amb. 105.

(n) *Lord Grey de Wilton v.*
Saxon, 6 Ves. 106. *Drury v. Mo-*
lins, *ibid.* 328. *London (Mayor)*
v. Hedger, 18 Ves. 353.

(o) *Woodward v. Gyles*, 2 Vern.
 119.

(p) *Barret v. Blagrove*, 5 Ves.
 555.

(q) *Sir Wm. Pulteney v. Shel-*
ton, 5 Ves. 147, 260, n. (a). *Lath-*
ropp v. Marsh, 5 Ves. 259, *et vide*
 1 Geo. IV. c. 87, s. 3, *noticed,*
supra.

(r) *Ward v. Duke of Bucking-*
ham, 10 Ves. 161.

A distinction, however, is to be made between those cases where an actual and express covenant exists, and where the tenant is merely bound by an implied covenant arising out of the custom of the country, or evidenced by his having previously held under an expired lease containing covenants as to the management of the premises. Where there is only an implied covenant, and the tenant's proceedings do not amount to actual waste, the Court will not in general interfere. (r) And where a tenant under a written agreement to manage and quit premises agreeably to the manner in which they had been managed and quitted by former tenants, having received notice to quit, proceeded to carry off crops, Lord *Eldon*, C., held, that he was not bound to conform to the covenants in the lease of a former tenant, without notice, and that the custom of the country could not be considered where there was a written agreement. (s)

But where a tenant from year to year, having received notice to quit, was proceeding to take away the crops, manure, &c., contrary to the usual course of husbandry, and to cut and damage the hedge-rows, &c., the Lord Chancellor granted an injunction, observing, that "the principle applied equally to the case of a tenancy from year to year, as to a lease for a longer term. The judges have uniformly said in modern times, that a tenant from year to year must treat the farm in a husbandlike manner, according to the custom of the country; and the Court must give its aid equally in that case; with the qualification that he is not to remove any thing, except according to the custom of the country." (t)

And where the tenant, in revenge for the landlord's having distrained, threatened to sow the land with mustard seed, which is very injurious to the soil, and requires many years to eradicate it, the Court granted an injunction. (u)

(r) *Kimpton v. Eve*, 2 Ves. & Bea. 349. 173. And see *Pulteney v. Shelton*, 5 Ves. 147, 260, n. and *Lathropp*

(s) *Liebenrood v. Vines*, 1 Meriv. 15. *v. Marsh*, *ibid.* 259.

(u) *Pratt v. Brett*, 2 Mad. Ch. Rep. 62.

(t) *Onslow v. ———*, 16 Ves. Rep. 62.

Where tenants abuse their right of cutting estovers, the Court will grant an injunction, as if they cut turf *for sale* although on affidavit it is stated that the tenants and those under whom they derived as tenants to the plaintiff, had been in the habit of cutting turf for sale for upwards of eighty years. (v)

But if the landlord lie by, and suffer the tenant to lay out money in altering the premises, the Court will construe this into a consent, and will refuse him an injunction, although such alterations may in strictness amount to waste. As where a lease was granted in 1725, and a logwood-mill was erected; and in 1775 the lease being renewed, the mill was included under the description of a logwood-mill; the lessee subsequently altered the mill into a cotton mill of great value;—and upon the landlord's contending that this alteration was waste, and praying an injunction, Mr. Justice *Buller*, who sat for the Lord Chancellor, refused the injunction because it appeared that the landlord had lain by, had seen the cotton-mill erected, and had approved of the lessee's planting about the mill. (w)

Where the defendants applied to the plaintiffs, who were coachmakers, and also owners of a private house adjoining the premises in which they carried on their business, for a lease of the private house; and this being accordingly granted to them, upon an agreement that the lessees should lay out 100*l.* upon exterior repairs under the direction of the plaintiffs, the defendants instantly proceeded to make alterations in the house for the purpose of carrying on the business of coachmakers, and the house being old, was in danger of falling: the Lord Chancellor, under the circumstances, granted an injunction to restrain the defendants from proceeding to pull down the house. (x)

(v) *Lord Courtown v. Ward*, 1 Sch. & Lef. 8.

(w) *Brydges v. Kilburne*, cited in *Jackson v. Cator*, 5 Ves. 689.

(x) *Bonnett v. Sadler*, 14 Ves.

526. As to tenant for years without impeachment of waste, see *Bishop of London v. Webb*, 1 P. Wms. 527.

Where waste has been committed, the modern remedies are by action of assumpsit, covenant and action on the case. Remedies for waste.

The action of assumpsit lies where the tenancy is by agreement not under seal, or on an implied covenant as to cultivate, &c. Assumpsit.

The action of covenant arises on an express covenant as to repair, but the lessee has, in general, the option to bring his action on the covenant, or on the case. Covenant.

The action on the case lies by the reversioner against the tenant or stranger for waste, and extends it is said even to a tenant by sufferance. (y) Case.

2. At common law, where waste had been committed, an action of waste lay against the tenant to recover the place wasted, as well as damages for the injury done to the inheritance. 2. Punishment of waste at common law.

This action, however, could only be brought by him who had *the immediate* reversion or remainder in *fee* or in *tail* to whose *disinheritance* the waste was always alleged to have been committed (yy); and, therefore, if a lease was made to A. for life or years, with remainder to B. for life, and A. committed waste, no action could be brought, so long as the estate of B. continued : (z) but if B. afterwards died, or surrendered his estate, the reversioner in fee or in tail might then have brought an action against A. for the waste so done by him ; for by the death or surrender of B. the impediment was removed. (a) And if a lease for life was made, remainder *for years*, the reversioner or remainder-man in fee, or in tail, might have brought the action, notwithstanding the mesne

(y) See Chitty on Pleading, vol. 1, p. 141.

(yy) Co. Lit. 53, a.

(z) Co. Lit. 54. a. Bray v. Tracy,

Cro. Jac. 688. S. C. Sir W. Jones' 51. Udal v. Udal, Aleyn, 81.

(a) Ibid. Paget's case, 5 Rep.

77, a. Anon. Moore, 387.

remainder. (b) As the action of waste did not lie by a remainder-man for life, tenant in tail after possibility, being in effect only tenant for life, could not have an action of waste. (c) Nor could any person maintain this action unless he had an estate of inheritance in him *at the time when the waste was committed*; and therefore it did not lie by an heir for waste done in the time of his ancestor. Nor by the grantee of a reversion for waste committed before the grant. (d)

At common law, the action of waste lay only against tenant by the curtesy, tenant in dower, or guardian: for as these estates were created by law, the law took care to give the reversioner a remedy for an act so injurious to the inheritance; but the common law provided no such remedy against tenant for life, *pur autre vie*, for years, or at will, because as those estates were created by grant, it was competent to the grantors to protect the reversion by a special provision against waste. (e)

By the statute of *Gloucester*, (f) however, this action was given against lessee for life or tenant *pur autre vie*, and tenant for years; (g) and against the assignee of tenant for life or years, for waste done after the assignment. (h) Against tenant at will the statute gave no action, and, therefore, against him an action of waste would not lie. (i) Nor would an action of waste lie against an executor for waste committed by the testator; waste being a tort, the action for which died with the person. (k)

When the defendant had committed waste, and still remained in possession, the writ of waste charged him in the

(b) Co. Lit. 54. a. 2 Inst. 301.

(c) Co. Lit. 53. b. 2 Rol. Abr. 825. l. 31.

(d) 2 Inst. 305. 2 Wms. Saund. 252. n. (7.)

(e) *Ibid.*

(f) 6 Edw. 1, c. 5.

(g) 2 Inst. 301.

(h) *Sanders v. Norwood*, Cro. Eliz. 683. S. C. 5 Rep. 13.

(i) *Countess of Salop v. Crompton*, Cro. Eliz. 777, 784. S. C. Noy. 51.

(k) 2 Inst. 302. 2 Rol. Abr. 828. l. 32.

tenet; (l) if the estate for which he held the premises was determined, he was charged in the *tenuit*. (m) But if tenant *for life* committed waste, and afterwards granted over his estate, or the lessor entered for a forfeiture or breach of the condition, the action, it seems, was still in the *tenet*, (n) though it was otherwise in an action against tenant *for years*. (o)

It was necessary the declaration in waste should shew how Declaration.
the plaintiff was entitled to the inheritance; and, therefore, where the plaintiff declared upon a lease made by himself, the declaration must have alleged a seisin in fee, or in tail, in him, and then shewed a demise to the defendant; if upon a lease made by his ancestor, it must have stated a seisin in fee in the ancestor, a demise by him to the defendant, and a descent to the plaintiff. (p) If the plaintiff claimed as assignee of the reversion, he must have shewn his title to it by grant or devise; (q) and it was unnecessary to name him assignee. (r) If by fine, the declaration must have stated the fine, and the uses of it; (s) if by common recovery, it must have set forth the recovery, and the uses thereof. (t) In an action of waste by parceners, or joint-tenants, the declaration must have alleged them to be such; (u) if the plaintiff sued as rector, &c. in right of his church; he must have shewn that he was so. (v) If husband and wife in right of the wife brought the action, the declaration must have stated the reversion to be in both. (w) And the plaintiff must, in all cases, have proved his title as laid in the declaration. (x)

It was also necessary the declaration should particularly

(l) *Sacheverell v. Bagnall*, Cro. Eliz. 356.

(m) *Ibid.* 2 Rol. Abr. 829. l. 43, &c.

(n) *Ibid.* l. 28.

(o) *Ibid.* Saunders's case, 5 Rep. 13.

(p) *Skeat v. Oxenbridge*, Hob. 84. *Ewer v. Moile*, Yelv. 140. Co. Entr. 708. b. 2 Wms. Saund. 235. n. (2.)

(q) *Grene v. Cole*, 2 Saund. 235. *Leigh v. Leigh*, Lutw. 1541.

(r) 2 Rol. Abr. 831. l. 46.

(s) *Ibid.* Co. Entr. 700.

(t) *Ibid.* Winch's Entr. 1139.

(u) *Ibid.* 1163.

(v) *Ibid.* 1161.

(w) *Earl of Clanrickard v. Sidney*, Hob. 1.

(x) *Leigh v. Leigh*, Lutw. 1547.

specify the nature and quantity of the waste done ; and a variance as to the nature was fatal ; as if the declaration alleged the waste to have been cutting trees, and it appeared that the defendant *stubbed* them up. (y) But to maintain the action the plaintiff was not bound to prove the *whole* waste as laid, but might recover *pro tanto*. (x) Where waste was assigned in houses, the declaration must have shewn the particular defects. (a)

The declaration must have stated it to be "to the disinheriting" of the plaintiff: (b) but if husband and wife, seised in fee in right of the wife, brought waste, it must have been laid to be "the disinheriting of the wife," for it was her inheritance that was damnified by the waste ; and, if it was alleged to be to the disinheriting of husband and wife, the writ abated. (c)

Where the action was in the *tenet*, the plaintiff had judgment to recover the place wasted and damages ; where it was in the *tenuit* the judgment was for damages only. (d)

If the jury found a verdict for the plaintiff in an action of waste, and gave damages under 20*d.*, it seems that judgment should have been given for the defendant. (e)

It was, however, held, that cutting trees to the value of 3*s.* 4*d.* was waste ; and that several particular wastes, each of small value, might be united, so as to make a large sum sufficient to maintain the action ; as where damage was found in one house to the value of 20*d.* ; in another to the value of

(y) *Ibid.*

(x) 2 Rol. Abr. 832. l. 49, 53.
2 Wms. Saund. 235. n. (3.)

(a) 2 Wms. Saund. *ub. sup.*

(b) Co. Lit. 285, n. It seems that the words *to the disinheriting*, would, *after verdict*, have cured the omission to state in the declaration the quantity of the plaintiff's estate.

Aston v. Whetenell, Cro. Eliz. 57.

But see 2 Wms. Saund. 235. n. (2.)

(c) 2 Rol. Abr. 832. l. 13.

(d) 2 Wms. Saund. 250. n. (6.)

(e) *Ibid.* Bro. Abr. *Waste*, 123.
Co. Lit. 54. a. 2 Inst. 306. *King v. Fitch*, Cro. Car. 414. *Keepers of Harrow School v. Alderton*, 2 B. & P. 86.

22*d.*, and in a third to the value of 12*d.*; though these damages taken separately would not have been sufficient to support the action, yet by adding them together, and making one sum of the whole, the sum was sufficient to entitle the plaintiff to his judgment. (f)

The difficulties attending the action of waste caused it to be of late little resorted to; and an action on the case in the nature of waste became, and is now the ordinary means of recovering damages for voluntary waste committed by the tenant during his occupation. By this form of action on the case the reversioner or remainder-man *for life* or *years* may recover damages; (g) and this action is maintainable against tenants at will or by sufferance; to which persons the action of waste did not, as we have seen, apply. (h) And it lies against tenant for years *after* the expiration of his term. (i)

Action on the case,

when maintainable.

Though the lease contain an express covenant against waste, so as to give the lessor his remedy by action of covenant, he may still, if he choose, bring an action on the case against the lessee, for waste done by him during the term. As where a lease was made for twenty-one years, in which the lessee covenanted to yield up the premises repaired at the end of the term; and the lessee during the term committed waste, and at the expiration thereof delivered up the premises to the lessor in a ruinous condition; the lessor brought an action on the case against the tenant for the waste committed by him during the term: and it being objected at the trial, that the plaintiff ought to have brought an action of *covenant*, and not *on the case*, a verdict was found for the plaintiff, subject to that point: the Court of Common Pleas was clearly of opinion that an action on the case was maintainable as well as covenant; and *De Grey, C. J.*,

(f) Bro. Abr. *Waste*, 70. Co. 187. S. C. Sir W. Jones, 224. Lit. 54, a.

(g) 2 Wms. Saund. 252, n. (7.)

(h) *West v. Treude*, Cro. Car.

(i) *Kinlyside v. Thornton*, see next page.

said, "Tenant for years commits waste, and delivers up the place wasted to the landlord: had there been no deed of covenant, an action of waste, or case in the nature of waste, would have lain: because the landlord by the special covenant acquires a new remedy,—does he, therefore, lose his old?" (*k*)

Form of
declaration.

In an action on the case in the nature of waste, brought by a landlord, whether the immediate lessor, or heir, or assignee, against his tenant, whether lessee or his assignee, it does not appear to be necessary, to set out the title either of the plaintiff or the defendant in the declaration: it is enough to state their relation to each other. But where an estate is given to A. for life, with remainder to B. in fee or in tail, and A. is guilty of waste, it seems necessary to set forth in the declaration the quantity of estate of which A. is seised, though not the quantity of estate which the plaintiff has in the reversion, for that is matter of evidence only. (*l*)

Nature of
waste to be
stated.

It seems necessary, in an action on the case, to state in the declaration the nature and kind of waste which is the subject of the action: and the plaintiff will not be permitted to give evidence of a different sort of waste from that which is laid in the declaration. (*m*) And wherever the plaintiff declares as reversioner for an injury done to his reversion, the declaration must either expressly allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be *necessarily* injurious to it, otherwise the want of such allegation will be cause for arresting the judgment. (*n*) The plaintiff is not bound to prove the whole waste stated; nor need the jury find how much of the place is wasted, as in an action of waste, where the plaintiff was to have seisin

(*k*) *Kinlyside v. Thornton*, Bl. Rep. 1111.

(*l*) 2 Wms. Saund. 252, n. (7.)

(*m*) *Harris v. Mantle*, 3 T. R. 307.

(*n*) *Jackson v. Pesked*, 1 M. & S. 234.

of the place wasted; whereas in this action the plaintiff only goes for damages, which the jury may assess generally. (p)

In a modern case, (q) an action on the case was brought by the landlord against his tenants for pulling down part of the wall and opening a door out of the house into a street, whereby the house was greatly damaged, weakened, and injured, and the plaintiff was greatly prejudiced in his reversionary estate and interest of and in the premises. The jury found that the defendants did open the door without the lessor's leave, but that the house was not in any respect weakened or injured thereby. The judge directed a verdict to be entered for the plaintiff, with nominal damages, subject to a case. On argument, it was held, that inasmuch as the reversionary right of the plaintiff might be injured by the alteration in the premises, although the house was not damaged, and as that question had not been submitted to the jury, the Court would direct a new trial.

On the question, whether action on the case lies for *per-* Permissive
waste.
missive waste, considerable difference of opinion has prevailed. In a note in a valuable modern treatise, (r) the authors state, that much of the difficulty has arisen from not distinguishing between tenancies at will and tenancies from year to year, as affected by the provisions of the statute of *Gloucester*. And they put the case in this form:—the statute of *Gloucester* gives a remedy for waste in the case of tenancies for years, or for a less term than a year, but is held not to extend to tenancies strictly at will. (s) It has been expressly decided, that those tenants who are within the provisions of the statute are liable to an action of waste, as well

(p) 2 Wms. Saund. 252, n. (7.)

(q) *Young v. Spencer* and another, 10 B. & C. 145. 5 Man. & Ryl. 47.(r) *Amos & Ferard on Fixtures*, 226.

(s) Co. Lit. 54. b. 2 Inst. 302. 6 Rep. 37.

for permissive as voluntary. (t) The question, therefore is, whether the action of case in the nature of waste, which has been substituted in lieu of the action of waste, cannot be supported in all the cases in which the old action could itself have been supported. They then state that in the Countess of *Shrewsbury's* case, (u) it was decided that an action upon the case, in the nature of waste, could not be maintained against tenant at will for permissive waste, by reason that the statute of *Gloucester* did not extend the remedy by action of waste to tenants at will; and thence they very fairly infer that an action upon the case for waste would lie against tenant for years, because the statute did extend to such a case. And then after reference to Mr. Serjeant *Williams's* notes in 1 *Saund.* 323, and 2 *Saund.* 259, in which he states generally that the action will lie for permissive as well as voluntary waste; and after stating that it had, however, been thought that a contrary doctrine had been established by some modern decisions, which they briefly review, they conclude, that it seems very questionable, whether such a position can be maintained, except in respect of tenancies at will, in the strict sense of the term.

The modern authorities alluded to, are the cases of *Gibson v. Wells*, (v) *Herne v. Bembow*, (w) and *Jones v. Hill* (x)

The first of these was a case at *nisi prius* before Sir James *Mansfield*, C.J., where the plaintiff, in an action upon the case, charged the defendant, who had been his tenant *at will*, with permissive waste; the learned judge nonsuited the plaintiff, saying, "that although an action on the case in the nature of waste might be maintained for *commissive* waste, yet he had never known an instance of such an action being maintained

(t) Co. Lit. 53. a. 2 Inst. 145.
2 Rol. Abr. 816. Owen, 92. 1
Saund. 323. a. 2 Saund. 252, 259.
1 Salk. 19. 3 Lev. 359. Co. Lit.
56. b. note, 376.

(u) 5 Rep. 14. Cro. Eliz. 777,
784.
(v) 1 N. R. 290.
(w) 4 Taunt. 764.
(x) 7 Taunt. 392. 1 Moore, 100.

for permissive waste only." And upon a motion for a rule to set aside the nonsuit, the chief justice said, he thought the action an innovation, and was not disposed to encourage it; and the other judges concurring, the rule was refused.

It must be observed, that in this case the opinion of the C. J. is expressed in very general terms, as to the action on the case for permissive waste; yet the defendant was in fact tenant at will only, and therefore the decision amounted to nothing more than the judgment in the Countess of *Shrewsbury's* case, and probably was not intended by the Court to apply beyond the law in that case.

In *Herne v. Bembow*, the tenant, however, held under a lease for years, and the general doctrine, as laid down in *Gibson v. Wells*, would seem to have been adopted by the Court. But the authority cited in support of the judgment, was the case of the Countess of *Shrewsbury*, which, unquestionably, did not bear it out.

In *Jones v. Hill*, which was an action on the case for waste against the assignee of a lease, for omitting to put the premises in such repair as a former tenant had put them in, it was contended, that though an action on the case for permissive waste would not lie against strict tenant at will, yet it lay against tenant for years, or from year to year. *Gibbs*, C. J., would not give an opinion whether permissive waste would lie in the cases mentioned, but held it was impossible it should be waste to omit putting the premises in such repair as A. B. had put them into.

In *Harrison's Woodfall on Landlord and Tenant*, it is stated, that the better opinion seems to be, that the action is maintainable against all, except tenant from year to year, and strict tenants at will. It may probably be more correct to confine the exception to the latter class of tenants. (x)

II. In case of other injuries.

If the tenant do any act which is injurious to the reversion, an action on the case by the landlord will lie against him during the term, even though he might be able to restore the premises to their original state before its expiration. Where, therefore, the tenant of a manor enclosed the waste lands, upon which the reversioner and his future tenants would have had a right to depasture their cattle, the Court of King's Bench held that the tenant was immediately liable to an action upon the case. (*y*)

Where A. demised pasture land to B. except the trees, and B. put his cattle to feed, which barked the trees; it was ruled by *Holt*, C. J., after great doubt, that A. could not maintain trespass against B. (*x*)

Where the defendant, an outgoing tenant, before the end of his term sowed corn, under a notion that he would be entitled to the off-going crop at the end of the term; and delivered up possession of all the land excepting that part which was sown with the wheat; whereupon the landlord leased it to another tenant, reserving the crop of corn growing on the land; and afterwards the former tenant entered and cut and carried away the corn; it was held that the lessor might maintain trover against him for the corn so cut. (*a*)

But if, on the other hand, a lessor, during the term, cut down trees growing upon the demised premises, which are fit only for firewood, and the lessee take them away, trespass will not lie against the lessee, at the suit either of the lessor, or his vendee. (*b*)

The property in the cuttings of bushes, although improperly done as by a stranger, will be in the tenant and not in the landlord. (*c*)

(*y*) *Queen's College, Oxford, v. Hallet*, 14 East, 489.

(*x*) *Glenham v. Hanby*, Lord Raym. 739.

(*a*) *Davies v. Connop*, 1 Price, 53.

(*b*) *Channon v. Patch*, 8 D. & R. 651.

(*c*) *Berriman v. Peacock*, 9 Bing. 384. 2 Moore & Sc. 524.

SECTION VI.

OF THE LANDLORD'S PROCEEDINGS TO RECOVER
POSSESSION.

The landlord's right of possession being complete, he may enforce this right by a *peaceable* entry upon the premises :— but, in case the tenant refuse to yield up possession, the landlord ought not to have recourse to forcible measures, but should call in the law to his assistance. This proposition, however, must be taken with some qualification, for he may make a peaceable entry at the expiration of the tenancy, notwithstanding the tenant holds over, (c) and he may even take forcible possession by breaking open the door if the tenant and his family have left, subject to his liability to answer by indictment for the offence against the public peace. (d)

The almost universal practice is for the landlord to proceed in the first instance by action of ejectment, and receive possession at the hands of the sheriff. It was formerly thought necessary to make an actual entry : but it is now clearly understood that the right of entry in the lessor of the plaintiff will support an ejectment, although the lessor has never made an actual entry, the entry confessed by the tenant in the action being held sufficient. (e)

(c) *Taunton v. Costar*, 7 T. R. 431.

(d) *Turner v. Meymott*, 1 Bing. 158. 7 Moo. 574. *Hillary v. Gay*, 6 C. & P. 284.

(e) *Anon.* 1 Ventr. 248. *Little v.*

Heaton, Lord Raym. 750. S. C. ¹ Salk. 259. *Oates dem.* *Wigfall v. Brydon*, Burr. 1896. *Goodright dem.* *Hare v. Caton*, Dougl. 478. *Adams Eject.* 263, 3 edit.

By action of
ejectment.

The action of ejectment has now entirely superseded the ancient remedy *ejectione firma*. It is founded in a fiction, which supposes the owner of the lands to have made a lease to the plaintiff, and the plaintiff to have entered by virtue thereof, and to have been ousted by the defendant. The defendant having no interest in the lands, being merely a casual ejector, is then supposed to give a notice (which notice is, in fact, given by the lessor of the plaintiff) to the occupier, offering him an option either to come in, and by being admitted defendant in the action, put the lessor of the plaintiff to the proof of his title; or by suffering judgment to be entered against the casual ejector, to admit the title of the landlord. The landlord, therefore, if the action be defended by the tenant, must be prepared to prove that he is seised or possessed of the lands in the manner stated in the declaration, and that the supposed demise to the fictitious plaintiff has been made subsequently to the determination of the tenant's interest. (f)

Notice to quit.

Where a notice to quit has been given to the tenant, who accordingly quits so much of the lands demised as is occupied by himself, and gives notice to his under-tenants to quit also, who refuse to do so, the landlord may maintain ejectment against the tenant for so much as is occupied by the under-tenants; and it is no answer for the tenant that he has done every thing in his power by delivering up his own occupation, and giving notice to the under-tenants to do the same. (g)

In ejectment against a lessee of tithes, some evidence should be given, to show that he did not mean to quit. (h)
Ejectment lies for tithes without the rectory. (i)

Where a rector gave a notice to quit to the tenant of his

(f) *Aslin v. Parkin*, Burr. 667.
Chitt. on Plead. Vol. II. p. 625.
6 edit. Adams Eject. 212, 3 edit
(g) *Roe v. Wiggs*, 2 N. R. 330.

(h) *Doe dem. Brierly v. Palmer*,
16 East 53.
(i) *Cro. Car.* 301. Chitt. on
Plead. Vol. II. p. 625, 6 edit.

glebe land, which expired on the 25th of December, and on the 17th of January following a sequestration of the rectory was read in the church; and the rector afterwards, by order of the sequestrator, received from the tenant, who held over, a weekly allowance, which he described in a receipt as issuing out of the tithe and glebe; it was ruled by *Dampier, J.*, that the rector might maintain an ejectment, laying the demise on the 1st of January; because though after the publication of the sequestration, he was no longer entitled to the possession of the land, he was still entitled to maintain an ejectment through the medium of which he might recover the rents and profits accruing between the expiration of the notice to quit, and the publication of the sequestration. (*k*)

Where a defendant enclosed a small piece of waste land by the side of a public highway, and occupied it for thirty years without paying any rent; and at the expiration of that time, the owner of the adjoining land demanded sixpence rent, which the defendant paid on three several occasions within twenty years: it was held in ejectment, that this, in the absence of other evidence, was conclusive to shew that the occupation of the defendant began by permission, and entitled the plaintiff to a verdict. (*l*)

Admission of
landlord's title
by payment of
rent.

And where a cottage standing in the corner of a meadow, (belonging to the lord of a manor,) but separated from it, and from a high road, by a hedge, had been occupied for above twenty years without any payment of rent; and then the lord demanded possession, which was reluctantly given, the occupier being told that if he were allowed to resume possession it would only be during pleasure: and he did resume and keep possession for fifteen years more, and never paid any rent: it was held that the possession was not necessarily

(*k*) *Doe dem. Morgan v. Bluck*
3 Campb. 447.

kinson, 3 B. & C. 413; as to encroachments, *vide supra*, and see 3 & 4 Wm. IV. c. 27.

(*l*) *Doe dem. Jackson v. Wil-*

adverse, but might be presumed to have commenced by permission of the lord. (*m*)

In framing the declaration in ejectment, the principal points to be observed are,

1. Venue,

1. That, the action being local, the venue must be laid in the county in which the premises demised are situate. (*n*) But it has been already explained, that by the 3 & 4 Wm. IV. c. 42, s. 22, the Court may order the cause to be tried in another county or place.

2. Demise,

by husband
and wife :

by joint-
tenants and
co-parceners :

2. The demise to the fictitious plaintiff must be stated according to the title of the landlord; for though the tenant will be estopped from disputing his landlord's title, yet if it appear by the declaration that the landlord relies upon a title different from that in right of which he received the defendant as his tenant, the variance will be fatal to the landlord's claim. As if a husband seised in fee, *jure uxoris*, has made a lease jointly with his wife, and that lease being forfeited or expired he brings ejectment, and shews a demise to the plaintiff by himself *only*, the declaration will be bad. Where the lease has been made *jointly* by joint-tenants, or co-parceners, and they mean to recover the land from the lessee, the demise should properly be stated to have been *joint*, (*o*) but if a several demise be laid by each, of the *whole* land, they may recover the *whole*; (*p*) or if the demise be stated to have been made by one only of the whole, or of his share, he may recover *pro tanto*. (*q*) If, however, a power of re-entry for breach of condition descends to co-parceners, it seems very questionable whether they must not

(*m*) Doe dem. Thompson v. Clark, 8 B. & C. 717, *et vide* 3 & 4 Wm. IV. c. 27.

(*n*) Mayor, &c., of London v. Cole, 7 T. R. 588.

(*o*) Boner v. Juner, Ld. Raym. 726. Morris v. Barry, Str. 1181. S. C. 1 Wils. 1. Worrall v. Beck,

cited *ibid*.

(*p*) Doe dem. Lulham v. Fenn, 3 Campb. 190.

(*q*) Roe dem. Raper v. Lonsdale, 12 East, 39. Doe dem. Marsack v. Read, *ibid*. 57. Doe dem. Whayman v. Chaplin, 3 Taunt. 120.

all join in ejectment. (*r*) But tenants in common (who, not being seised *per tout*, never can make a joint lease) cannot state the demise to have been joint; but must enforce their rights to their respective shares by stating a separate demise by each; and thus, each recovering his own part, re-possess themselves of the whole land demised. (*s*)

by tenants in common.

3. The day upon which the demise to the fictitious plaintiff is stated to have been made must be laid to be subsequent to the landlord's right of entry, or it will be fatal. (*t*)

3. The day of the demise.

The formalities required by the common law, in order to give the landlord a right of re-entry for non-payment of rent, have been already considered. To facilitate the landlord's remedy upon such an occasion, and to extricate him from the difficulties in which these niceties frequently involved him, it is enacted by the statute 4 Geo. II. c. 28, s. 2, "That in all cases between landlord and tenant, as often as it shall happen that *one half-year's rent shall be in arrear*, and the landlord or lessor to whom the same is due, hath *right by law to re-enter for the non-payment thereof*; such landlord or lessor shall and may, *without any formal demand or re-entry*, serve a declaration in ejectment for the recovery of the demised premises; or in case the same cannot be legally served, or *no tenant be in actual possession of the premises*, may then *affix the same* upon the door of any demised messuage; or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments, comprised in such declaration in ejectment, and *such affixing shall be deemed legal service thereof*; which service or affixing such declaration in ejectment shall *stand in the place*

Proceedings under statute 4 Geo. II. c. 42.

4 Geo. II. c. 28.

(*r*) Doe dem. De Rutzen v. Lewis, 5 Ad. & Ell. 277.

Lit. 45. a. n. (7.)

(*s*) Blackasper's case, Noy, 13, et vide Doe dem. Aslin v. Summersett, 1 B. & Ad. 140. Hargr. Co.

(*t*) Goodtitle dem. Gallaway v. Herbert, 4 T. R. 680. Chitt. on Plead. Vol. II. p. 625, 6 edit. Adams Eject. 212, 2 edit.

and stead of a demand and re-entry; and in case of judgment against the casual ejector, or nonsuit for not confessing a lease, entry, and ouster, it shall be made appear to the Court, where the said suit is depending, by affidavit, or be proved upon the trial, in case the defendant appears, that half a year's rent was due before the said declaration was served; and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor or lessors in ejectment had power to re-enter, in every such case, the lessor or lessors in ejectment shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made: and in case the lessee or lessees, his, her, or their assignee or assignees, or other person or persons claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such ejectment and execution to be executed thereon without paying the rent and arrears, together with full costs, and without filing any bill or bills for *relief in equity within six calendar months* after such execution executed; then such lessee, &c., and all others claiming and deriving under the said lease, shall be barred or foreclosed from all relief in law or equity, other than by writ of error for reversal of such judgment in case the same shall be erroneous; and the said landlord and lessor shall from thenceforth hold the same demised premises discharged from such lease: and if on such ejectment, verdict shall pass for the defendant, or the plaintiff shall be non-suited therein, except for the defendant's not confessing, &c., then such defendant shall recover his, her, or their full costs. Provided always, that nothing therein contained shall extend to bar the right of any mortgagee or mortgagees of such lease, or any part thereof, who shall not be in possession, so as such mortgagee or mortgagees, within six calendar months after such judgment obtained and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor, or persons entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements

which on the part and behalf of the first lessee or lessees, 4 Geo. II.
ought to be performed." And by section 3 it is further c. 28.
enacted, " In case the said lessee or lessees, his, her, or their
assignee or assignees, or other person, claiming any right,
title, or interest, in law or equity, of, in, or to the said lease,
shall, *within the time aforesaid*, file one or more bill or bills,
for relief in any court of equity, such person or persons shall
not have or continue any injunction against the proceedings
at law on such ejectment, unless he, she, or they, within forty
days next after a full and perfect answer shall be filed by the
lessor or lessors of the plaintiff in such ejectment, bring into
court, and lodge with the proper officer, such sum of money,
as the lessor or lessors of the plaintiff in the said ejectment
shall, in their answers, swear to be due and in arrear, over and
above all just allowances, and also the costs taxed in the said suit;
there to remain till the hearing of the cause, or to be paid out
to the lessor or landlord, on good security, subject to the
decree of the court : and in case such bill or bills shall be filed
within the time aforesaid, and after execution is executed, the
lessor or lessors of the plaintiff shall be accountable only
for so much, and no more, as he, she, or they shall really
and *bonâ fide*, without fraud, deceit, or wilful neglect, make
of the demised premises, from the time of their entering into
the actual possession thereof; and if what shall be so made
by the lessor or lessors of the plaintiff happen to be less than
the rent reserved on the said lease, then the said lessee or
lessees, his, her, or their assignee or assignees, before he,
she, or they shall be restored to his, her, or their possession
or possessions, shall pay such lessor or lessors, landlord or
landlords, what the money so by them made fell short of the
reserved rent, for the time such lessor or lessors of the plain-
tiff, landlord or landlords, held the said lands." And by
section 4, it is provided, " that if the tenant or tenants, his,
her, or their assignee or assignees, shall at any time *before*
the trial in such ejectment *pay or tender to the lessor or*
landlord, his executors or administrators, or his, her, or their
attorney in that cause, or pay into the court where the same

4 Geo. II.
c. 28.

cause is depending, *all the rent and arrears*, together with the costs; then all further proceedings in the said ejectment shall cease and be discontinued; and if such lessee, &c., or their executors, administrators, or assigns, shall, upon such bill filed as aforesaid, be relieved in equity, he, she, and they shall have, hold, and enjoy the demised lands according to the lease thereof made, without any new lease to be thereof made to him, her, or them." (u)

Construction
of.

The landlord, by the terms of the statute, can only avail himself of this remedy, where there is a condition for re-entry, and half a year's rent is in arrear, and there is no sufficient distress upon the premises to countervail the arrears of rent then due. Where a landlord, having a right of re-entry for non-payment of rent, brought an ejectment against the tenant; and on trial proved a demand of half a year's rent *after* the day on which it became due, but it appeared that there *was a sufficient distress upon the premises*; it was holden, that no ejectment lay upon this statute; and the landlord could not recover at common law, because the rent was not demanded on the day when it became due. (v)

No demand
necessary.

Under this statute no demand is necessary. And where a lease contained a proviso for re-entry in case rent were in arrear twenty-one days after the day on which it became due, *being lawfully demanded*, three judges of the Court of King's Bench held, that it was merely necessary to prove that the rent was in arrear, and no sufficient distress was upon the premises, without shewing that any demand had been made. But Lord *Ellenborough*, C. J., was of a contrary opinion; and thought that as the party had stipulated for a demand, the lessor was bound to make one; although he agreed that

(u) As to relief under this statute, *vide infra*.

(v) Doe dem. Forster v. Wandlass, 7 T. R. 117. As to the con-

tinuance of the common law remedy, see the observations of Baron Wood in Doe v. Smith, 1 B. & B. 187.

it was unnecessary to follow the niceties and formalities required by the common law. (w)

And it has been since held that, though by this statute the service of the declaration in ejectment is substituted for the formal demand of rent, which at common law must have been made upon the day when the forfeiture accrued in case of non-payment, still it is not necessary that the day of the demise in the declaration should be the very day of the service; it is enough if the day of the demise be after the rent become due; for the title of the lessor must be taken to have accrued, on the day when the forfeiture would have accrued, at common law, by non-payment of the rent. (x)

Where a lease contained a proviso for re-entry, "in case the rent or any part should be behind and unpaid *by the space of fourteen days* next over or after any or either of the days of payment on which the same ought to be paid, and no sufficient distress being found in and upon the same premises, whereby to levy such rent:" and at Lady-day the rent became due; and not being paid, the landlord *in May* sent a broker upon the premises for the purpose of making a distress: but nothing being found upon the premises, he brought an ejectment to recover possession: and it was thereupon objected that, in order to establish a forfeiture, it ought to have been shewn that there was no sufficient distress for fourteen days after the rent was due, as well as that the rent was in arrear; whereas it was only proved, that there was no sufficient distress on one day *in May*, which might have been the case upon that one day only: the Court thought that this was *prima facie* evidence to call upon the defendant to shew that there was a *sufficient distress upon the premises within the terms* of the proviso. (y)

(w) Doe dem. Scholefield v. cross, 3 B. & C. 752.

Alexander, 2 M. & S. 525. Vide
Ludwell v. Newman, 6 T. R. 458.

(y) Doe dem. Smelt v. Fuchau,
15 East, 286.

(x) Doe dem. Lawrence v. Shaw-

Affidavit
where the
ejectment is
undefended.

Under this statute where judgment is obtained against the casual ejector, or where the plaintiff has been nonsuited on account of the tenant's non-appearance, *an affidavit* must be made in the Court, that half a-years' rent was in arrear before declaration served; that the lessor of the plaintiff had a right to re-enter; that no sufficient distress was to be found on the premises countervailing the arrears of rent then due; that the premises were untenanted, or that the tenant could not be legally served with the declaration; and that a copy of the declaration was affixed on the most notorious part of the premises, describing it. (x)

When pre-
sumed.

The affidavit will, in some cases, be presumed; as after a long and quiet possession. Thus, where an ejectment was brought by a landlord against his tenant, under this statute, and judgment was had against the casual ejector by default, and possession thereupon delivered, and nearly twenty years after the tenant brought an ejectment against the same landlord for the same premises; the landlord, who was made defendant in the latter action, was not obliged to produce such an affidavit as this clause requires, as an essential requisite to his original recovery; for as it was essentially requisite, the Court presumed that such an affidavit had been regularly made at the time, and that the judgment was founded on it. (a)

Proof at the
trial.

When the cause goes on to trial, the appearance of the defendant, together with the consent rule, substantiates the averments in the declaration of the lease, entry, and ouster, and the *possession* of the lands for which he defends. (b) It then remains for the plaintiff to prove the right of entry by the non-payment of the rent, and the absence of a sufficient distress. (c)

(x) *Vide* 1 Wms. Saund. 287. b. n. (16.)

(a) *Doe dem. Hitchings v. Lewis*, Burr. 614.

(b) *Reg. Cur. B. R.* 1 Geo. IV. C. B. 1 & 2 Geo. IV. Excheq. 2. G. 4, *vide infra*, et see *Append.*

(c) *Vide* 1 Wms. Saund. *supra*.

By the late act, (d) for the more effectual administration of justice in England and Wales, reciting that, whereas landlords to whom a right of entry into or upon any lands or hereditaments, may accrue during or immediately after Hilary and Trinity Terms respectively, were unable to prosecute ejectments against their tenants so as to try the same at the assizes immediately ensuing, whereby much delay was occasioned in the recovery of the possession of lands and tenements wrongfully withheld by tenants against their landlords; it was enacted, that in all actions of ejectment thereafter to be brought in any of his Majesty's Courts at Westminster by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments, where the tenancy shall expire, or the right of entry into or upon such lands or hereditaments shall accrue to such landlord in (e) or after Hilary or Trinity Terms respectively, it shall be lawful for the lessor of the plaintiff in any such action at any time within ten days after such tenancy shall expire or right of entry accrue as aforesaid, to serve a declaration in ejectment, entitled of the day next after the day of the demise in such declaration, whether the same shall be in term or in vacation, with a notice thereunto subscribed requiring the tenant or tenants in possession to appear and plead thereto within ten days in the Court in which such action may be brought, and proceedings shall be had on such declaration, and rules to plead be entered and given in such and the same manner as nearly as may be as if such declaration had been duly served before the preceding term. Provided always, that no judgment shall be signed against the casual ejector until default of appearance and plea within such ten days, and that, at least, six clear days' notice of trial shall be given to the defendant before the commission day of the assizes, at which such ejectment is intended to be tried. Provided also, that any defendant in such action may at any time before the trial thereof, apply to a judge of either of his Majesty's superior Courts

1 Wm. IV.
c. 70.

d) 11 Geo. IV. and 1 Wm. IV.
c. 70, s. 36.

(e) i. e. in full term. See Selw.
N. P. 729, 9 edit.

at Westminster by summons, in the usual manner, for time to plead or for staying or setting aside the proceedings, or for postponing the trial until the next assizes, and that it shall be lawful for the judge, in his discretion to make such order in the said cause as to him shall seem expedient. And that in making up the record of the proceedings on any such declaration in ejectment, it shall be lawful to entitle such declaration specially of the day next after the demise therein, whether such day shall be in term or vacation, and no judgment thereupon shall be avoided or reversed by reason only of such special title.

This statute only applies to issuable terms, as Hilary and Trinity, and in other cases the parties must proceed as formerly. (e)

The statute does not apply if the premises are in London or Middlesex, so as not to require a trial at the assizes, (f) or where the landlord's right of entry accrued on the day after the essoin day in Trinity Term, (g) or where a tenancy expired under an agreement on the day before the first day of the term. (h)

In respect of the six days' clear notice of trial before the commission day of the assizes, it seems the act does not make such notice a necessary condition of the plaintiff's recovery, and, therefore, if the defendant appear, it is no ground of objection, although if the defendant had not appeared, and the plaintiff had proceeded against him, it might have been a good ground for setting aside the verdict. (i)

In the trial at Nisi Prius, it is no defence that the decla-

(e) *Doe v. Roe*, 2 Crompt. & Jerv. 124. 1 Dowl. Prac. Ca. 304. Tidd's New Practice, 624.

(f) *Doe dem. Norris v. Roe*, 1 Dowl. Prac. Ca. 547. 5 Leg. Obs. 491.

(g) *Doe v. Roe*, 1 Dowl. Prac. Ca. 79, and 7 Leg. Obs. 140.

(h) *Doe dem. Summerville v. Roe*, 4 Moo. & Sc. 747.

(i) *Doe dem. Antrobus v. Jepson*, 3 B. & Ad. 403.

ration was irregularly served, as where the right to enter accrued before the commencement of the term. (*g*)

In cases in which the tenancy is at will or for a term not exceeding seven years, at a rent not exceeding 20*l.* a-year, and on which no fine has been paid, a summary remedy has been provided by 1 & 2 Vict. c. 47, as already explained. (*h*)

1 & 2 Vic.
c. 47.

Where a tenant at a rack-rent has vacated the premises, and half a year's rent is in arrear, the legislature has provided for the landlord a summary remedy by which to recover possession; which remedy he may have recourse to, although the lease contain no clause of re-entry. For the statute 11 Geo. II. c. 19, s. 16, after reciting that, "whereas landlords are often great sufferers by tenants running away in arrear, and not only suffering the demised premises to be uncultivated without any distress thereon, whereby their landlords or lessors might be satisfied for the rent-arrear, but also refusing to deliver up the possession of the demised premises, whereby the landlords are put to the expense and delay of recovering in ejectment," enacts, "that if any tenant, holding any lands, tenements, or hereditaments, at a rack-rent, or where the rent reserved shall be full three-fourths of the yearly value of the demised premises, who shall be in arrear for *one year's* rent, shall desert the demised premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it shall and may be lawful to and for two or more justices of the peace of the county, riding, division, or place, (having no interest in the demised premises,) at the request of the lessor or landlord, lessors or landlords, or his, her, or their bailiff or receiver, to go upon and view the same, and to affix, or cause to be affixed, on the most notorious part of the premises, notice in writing what day (at the distance of

Proceedings
in case the
tenant desert
the premises.

Under 11
Geo. II. c. 19.

(*g*) Doe dem. Ranken v. Brindley. 4 B. & Ad. 84 1 Nev. & M. 1.
et vide Tidd's New Prac. 625. Chitt. Prac. 226,
(*h*) *Supra*.

11 Geo. II.
c. 19.

fourteen days at least) they will return to take a second view thereof: and if upon such second view, the tenant, or some person upon his or her behalf, shall not appear and pay the rent in arrear, or there shall not be sufficient distress upon the premises; then the said justices may put the landlord or landlords, lessor or lessors, into the possession of the said demised premises; and the lease thereof to such tenants, as to any demise therein contained only, shall from thenceforth become void."

"Provided always that such proceedings of the said justices shall be examinable in a summary way by the next justice or justices of assize of the respective counties in which such lands or premises lie; and if they lie in the city of London or county of Middlesex, by the judge of the Courts of King's Bench or Common Pleas; and if in the counties palatine of Chester, Lancaster, or Durham, then before the judges thereof; who are thereby respectively empowered to order restitution to be made to such tenant, together with his or her expenses and costs, to be paid by the lessor or landlord, lessors or landlords, if they shall see cause for the same; and in case they shall affirm the act of the said justices, to award costs not exceeding 5*l.* for the frivolous appeal."

If the magistrates put the landlord in possession of the premises as described, and on appeal to the judge of assize the order is reversed and restitution ordered, the record of the proceedings before the magistrates will be a bar to an action of trespass against any of the parties. (*i*)

Extended by
57 Geo. III.
c. 52.

By the statute 57 Geo. III. c. 52, the provisions of this statute are extended to tenants, who shall be in arrear *one half year's rent*, and who shall hold the lands under any demise or agreement, whether written or *verbal*, and although no right of power of re-entry be reserved or given to the landlord in case of non-payment of rent.

(*i*) *Ashcroft v. Bourne*, 3 B. & Ad. 684.

It is not necessary that any information or complaint should be made *on oath* in order to justify the interference of the magistrates under this statute. (*k*)

In other cases of vacant possession, the mode of proceeding to recover possession, is as follows: the claimant should execute a power of attorney, authorizing the attorney, in his name to grant a lease, which should be executed on the premises, the attorney and tenant only being present. The attorney should then retire, leaving the tenant alone, who should be turned off the premises by a party on whom a declaration in ejectment should be forthwith served. A rule to plead having been given and not complied with, a motion for judgment will be granted, of course, if supported by an affidavit of all the proceedings. (*l*)

At common law the mere fact of the tenant's not living upon the premises would not have amounted to a desertion, provided the tenant still occupied them by his goods. Where, therefore, A. made a lease of an ale-house in *London*, and before the expiration of the term the lessee left it, and took another house in *Wapping*, but left some liquor and old vessels in the London house, and the doors were locked; the Court thought that, as he still used the house, it could not be considered as a vacant possession; and *Probyn, J.*, mentioned a case where hay left in a barn was holden sufficient to keep the possession. (*m*) But as the statute expressly gives the landlord his remedy in case the tenant shall desert the premises, leaving no *sufficient* distress thereon, it seems that goods less than sufficient, will not negative the desertion contemplated by the act. Accordingly, where a tenant had ceased to reside upon the premises for several months, or to carry on his business there, and left them with no article of furniture except a French stove and the royal coat of arms, which together had cost him 150*l.*; but which were

What amounts to vacant possession.

(*k*) *Basten v. Carew*, 3 B. & C. p. 596.
649.

(*m*) *Savage v. Dent*, Str. 1064.

(*l*) *Selwyn's N. P.* 735, 9 edit., S. C. *Selwyn's N. P.* 736, 9 edit.
and see this more fully stated, *infra*, Bull. N. P. 97.

not sufficient to answer the year's rent ; the Court were of opinion that the possession was merely *colourable*, and that the tenant must be taken to have deserted the premises. And they held, that the case was not altered by the landlord's knowing where the tenant was at the time. (m)

Under the statutes the landlord cannot seize the tenant's goods.

These statutes are wholly silent as to the fixtures and moveables found upon the premises. With respect to the fixtures, indeed, inasmuch as the landlord's entry determines the relation of landlord and tenant, they never can be claimed by the tenant, even though they are merely ornamental, or erected for the purposes of trade ; because fixtures can only be removed during the continuation of the tenancy. (n) But the moveables the landlord cannot appropriate. He cannot, after entering into the premises, distrain them as for rent, because the tenant's interest is at an end. (o) He, may, indeed, distrain them *damage-feasant*, but he cannot sell them ; because a distress *damage-feasant* is strictly a mere pledge, and cannot be sold like a distress for rent ; which the statute 2 William and Mary, c. 5, has made saleable. So that, in consequence of the omission in these statutes, the goods of the deserting tenant are an incumbrance to the landlord, which he is unable to turn to any account ; and he will be liable to an action for disposing of them. The obvious course for the landlord to pursue, in case the goods can be got at without breaking the house, is to distrain them for rent arrear, before he proceeds under the statutes. If, however, the house or premises be fastened, he cannot distrain ; for he cannot break open the house without being a trespasser, unless he break it open under the statute, which breaking and entering amounts to a dissolution of the tenancy, and this, as we have seen, puts an end to his right of distress. It may also be observed that, supposing the tenant to have deserted the premises, leaving *sufficient* furniture locked up in the house to satisfy the arrears of rent, the landlord cannot avail himself of the benefit of these statutes, and is, indeed, without

(m) *Ex parte Pilton*, 1 B. & A. 369.

(n) *Supra*, 236.

(o) *Supra*, 430.

a remedy; for it is a condition precedent that there should not be a sufficient distress upon the premises; and the sufficient distress he cannot take; he may see it through the windows, but he cannot break through them to get at it.

If the tenant covenant to keep in good repair a steam engine on the premises, with the boiler and attached gearing in the mill or factory, renewing, at his own expense, such parts thereof as should be broken or damaged beyond the unavoidable deterioration thereof by wear and tear, and the same being so well and sufficiently in repair, and renewed at the end, or sooner determination of the said term, peaceably and quietly, to leave and deliver up to the lessors, afterwards removes the engine from the works, and adds an engine of greater power, and adds also to the height and extent of the mill, a court of equity will grant an injunction against the assignees of the lessee, (having become bankrupt) from removing the substituted engine and the new building, subject to an action to be brought by the lessors to try the right. (*p*)

A covenant by the lessee, to leave all improvements, will include whatever is fastened to the premises, and, therefore, the tenant cannot remove millstones set up during the lease, but which he might otherwise have done by custom of tenants. (*q*)

The landlord, having recovered possession, may at common law bring an action of trespass *vi et armis* against the tenant for the *mesne profits*; that is, such profits as the tenant has received during the time of his holding over. But the necessity of resorting to an action for *mesne profits* and the costs of the ejectment, in certain cases between landlord and tenant, are now obviated by a late act, (*r*) by which, after

Trespass for
mesne profits.

(*p*) *Sunderland v. Newton*, 3 Taunt. 19.
Sim. 450.

(*q*) *Martyr v. Bradley*, 9 Bing. 24, *et vide* *Naylor v. Colling*, 1
(*r*) 1 Geo. IV. c. 87. This act extends to all parts of Great Britain and Ireland except Scotland, s. 8.

But now by statute 1 Geo. IV. when the term is expired,

landlords bringing ejectments may give notice to tenants to appear in term, and then on production of the lease or agreement move for a rule nisi on the tenant to enter into a recognizance for costs, &c.

reciting that "the laws heretofore made for preventing the losses to which landlords are exposed by the unlawful holding over of lands and tenements by tenants, or persons claiming under them, after the expiration or legal determination of their terms or interest, have been found by experience insufficient, and it is therefore expedient to provide, in certain cases, a more expeditious mode for recovering the possession of lands and tenements so held over;" it is enacted, "that where the term or interest of any tenant now or hereafter holding *under a lease or agreement in writing* any lands, tenements, or hereditaments, for any term (t) or number of years certain, or from year to year, (v) *shall have expired or been determined (u) either by the landlord or tenant by regular notice to quit*, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made and signed by the landlord or his agent, and served personally upon, or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession, it shall be lawful for him, at the foot of the declaration, to address a notice to such tenant or person, requiring him to appear in the court in which the action shall have been commenced, on the first day of the term then next following, or if the action shall be brought in the counties palatine of Chester, Lancaster, or Durham, respectively, then on the first day of the next assizes, or at the court-day or other usual period for appearance to process then next following (as the case may be,) there to be made defendant, and to find such bail, if ordered by the court, and for such purposes, as are thereafter next specified; and upon the appearance of the party at the day prescribed, or in case of non-appearance on making the usual affidavit of service of the declaration and notice, it

(t) See Doe dem. Phillips v. Roe, *infra*.
ford v. Roe, *infra*.

(u) See Doe dem. Tindal v. Roe,

(v) See Doe dem. Earl of Brad- *infra*.

shall be lawful for the landlord, *producing the lease or agreement, or some counterpart or duplicate thereof*, (w) and proving the execution of the same by affidavit, and upon affidavit, that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid, to move the court for a rule for such tenant or person to shew cause, within a time to be fixed by the court on a consideration of the situation of the premises, why such tenant or person, upon being admitted defendant, beside entering into the common rule, and giving the common undertaking, should not undertake in case a verdict shall pass for the plaintiff, to give the plaintiff a judgment, to be entered up against the real defendant, of the term next preceding the time of trial, or if the action shall be brought in the counties palatine respectively, then of the assizes, or court-day (as the case may be) at which the trial shall be had, and also why he should not enter into a recognizance, by himself and two sufficient sureties, in a reasonable sum, (x) conditioned to pay the costs and damages which shall be recovered by the plaintiff in the action, and it shall be lawful for the Court upon cause shewn, or upon affidavit of the service of the rule in case no cause shall be shewn, to make the same absolute in whole or in part, and to order such tenant or person, within a time to be fixed, upon a consideration of all the circumstances, to give such undertakings, and find such bail, with such conditions and in such manner as shall be specified in the said rule, or such part of the same so made absolute; and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the Court to enlarge the time for obeying the same, then upon affidavit of the service of

1 Geo. IV.
c. 87.

On rule made absolute, if tenant shall not conform, judgment to be for the landlord.

(w) See *Doe dem. Caulfield v. Roe. Doe dem. Sampson v. Roe, Roe, infra.*

(x) See *Doe dem Phillips v.*

1 Geo. IV.
c. 87.

such order an absolute rule shall be made for entering up judgment for the plaintiff.

On trial of any ejectment between landlord and tenant, consent rule to be evidence of lease, entry, and ouster, if defendant make default; and juries to give damages for mesne profits down to the verdict, or to a day specified therein.

“ And wherever thereafter it shall appear on the trial of any ejectment, at the suit of a landlord against a tenant, that such tenant or his attorney hath been served with due notice of trial, the plaintiff shall not be nonsuited for default of the defendant's appearance, or of confession of lease, entry, and ouster; but the production of the consent rule and undertaking of the defendant shall, in all such cases, be sufficient evidence of lease, entry, and ouster; (w) and the judge before whom such cause shall come on to be tried shall, whether the defendant shall appear upon such trial or not permit the plaintiff on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits thereof, which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause, or to some preceding day, to be specially mentioned therein; and the jury on the trial, finding for the plaintiff, shall, in such case, give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits; provided always, that nothing thereinbefore contained shall be construed to bar any such landlord from bringing an action of trespass for the mesne profits which shall accrue from the verdict or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment. (x)

On trial after undertaking given and

“ And in all cases in which such undertaking shall have

(w) By a late rule of all the Courts, it is further provided, that in every action of ejectment the defendant shall specify in the consent rule for what premises he intends to defend, and shall confess that he was in possession of the premises at the time

of the service of the declaration. R. G. 1 Geo. IV. K. B. 4 B. & A. 196. R. G. 1 & 2 Geo. IV. C. P. 2 B. & B. 470. R. G. 3 Geo. IV. Excheq. 9 Price, 299.
(x) Sect. 2.

been given, and security found as aforesaid, if upon the trial a verdict shall pass for the plaintiff, but it shall appear to the judge before whom the same shall have been had, that the finding of the jury was contrary to the evidence, or that the damages given were excessive, it shall be lawful for the judge to order the execution of the judgment to be stayed absolutely till the fifth day of the term then next following, or till the next assizes, or court-day, (as the case may be;) which order the judge shall *in all other cases* make upon the requisition of the defendant, in case he shall forthwith undertake to find, and on condition that within four days from the day of trial he shall actually find, security by the recognizance of himself, and two sufficient sureties, in such reasonable sum as the judge shall direct, conditioned not to commit any waste, or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure produced or made (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be : provided always, that the recognizance last above mentioned shall immediately stand discharged and be of no effect, in case a writ of error shall be brought upon such judgment, and the plaintiff in such writ shall become bound with two sufficient sureties unto the defendant in the same, in such sum and with such condition as may be conformable to the provisions respectively made for staying execution on bringing writs of error upon judgments in actions of ejectment, by an act passed in England, in the sixteenth and seventeenth years of the reign of King Charles II., and by an act passed in Ireland in the seventeenth and eighteenth years of the reign of the same king, which acts are respectively intituled *an act to prevent arrests of judgment and superseding executions.* (y)

bail found, judge may stay the execution till the fifth day of the next term absolutely, or on tenant's finding security.

Bail in error will discharge such security.

16 & 17 Car. II. c. 8.

17 & 18 Car. II. c. 12. (Irish).

“That all recognizances and securities entered into pursuant in the provisions of the act shall be taken respectively

Recognizances to be taken as other recog-

(y) Sect. 3.

Q Q

recognizances of bail; actions on them limited.

in such manner and by and before such persons as are provided and authorized in respect of recognizances of bail, upon actions and suits depending in the Court in which any such action of ejectment shall have been commenced; and that the officer of the same Court, with whom recognizances of bail are filed, shall file such recognizances and securities, for which respectively the sum of two shillings and sixpence, and no more, shall be paid; but no action or other proceeding shall be commenced upon any such recognizance or security, after the expiration of six months from the time when possession of the premises, or any part thereof, shall actually have been delivered to the landlord." (s)

If landlord nonsuited, or verdict pass against him, double costs.

"That in all cases wherein the landlord shall elect to proceed in ejectment under the provisions thereinbefore contained, and the tenant shall have found bail, as ordered by the Court, then if the landlord upon the trial of the cause shall be nonsuited, or a verdict pass against him upon the merits of the case, there shall be judgment against him with double costs." (b)

Saving of former remedies.

Lastly, it is provided, "that nothing in the act contained shall be construed to prejudice or affect the right of action or remedy which landlords already possess, in any of the cases thereinbefore provided for." (c)

On moving for the rule *nisi*, under this statute, the original lease, or agreement for a lease, must be produced, duly stamped; (d) and the Court of Common Pleas has decided, that it is not sufficient if the instrument is stamped after the rule *nisi*, although before cause shewn. (e) In a prior case, (f) the Court of King's Bench appears to have entertained a contrary opinion as to the stamp. But the point did not call for a decision in that case.

(s) Sect. 4.

(a) Sect. 5.

(b) Sect. 6.

(c) Sect. 7.

(d) Doe dem. Caulfield v. Roe,

3 Bing. 329. N. S. Doe dem. Wood v. Roe, 3 Scott, 756.

(e) *Ibid.*

(f) Doe dem. Phillips v. Roe,

5 B. & A. 766.

The statute, it seems, applies only to cases in which there being a lease for years, it has expired by effluxion of time, or being a tenancy from year to year, it has determined by regular notice to quit. (g)

Cases within
the statute or
not.

It has also been decided, under this statute, that a tenancy, by virtue of an agreement in writing, for three months certain, is a tenancy "for a term," within the meaning of it: (h) but that a tenancy from year to year, *without* any written agreement or lease, is not within the statute; (i) nor is a tenancy for years determinable on lives, *though under a written lease*; (k) nor does the statute extend to the expiration of a subsisting lease on notice to quit given by the tenant, and accepted by the landlord; (l) nor to the case of a surrender by the lessee; (m) nor if the landlord permits the tenant to hold on from year to year after the expiration of the lease. (n)

This statute relieves the landlord only in the cases before mentioned. His course of proceeding in case of *forfeiture*, therefore, remains as before passing of the act.

If the tenant pays his rent to his landlord, and the premises are afterwards recovered in an adverse action, and the tenant is ejected at the suit of a person who recovers from the tenant the mesne profits for the period during which he paid the rent, the tenant may, in an action of assumpsit for money had and received, recover the rent back from his landlord, supposing him not to have set up any title at the trial. (o)

Recovery of
mesne profits
by tenant.

In cases of vacant possession, to which none of the above

Vacant
possession.

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|--|--|
| (g) Doe dem. Tindal v. Roe, 2 B. & Ad. 922. 1 Dowl. 542. | 7 B. & C. 2. |
| (h) Doe dem. Phillips v. Roe, 5 B. & A. 766. 1 Dowl. & Ry. 433. | (l) Doe dem. Cardigan v. Roe, 1 Dowl. & Ry. 540. |
| <i>Et vide</i> Doe dem. Marquis of Anglesea v. Roe, 2 Dowl. & Ry. 565. | (m) Doe dem. Tindal v. Roe, 2 B. & Ad. 922. 1 Dowl. 143. |
| (i) Doe dem. Bradford (Earl of) v. Roe, 5 B. & A. 771. | (n) Doe dem. Thomas v. Field, 2 Dowl. 542. |
| (k) Doe dem. Pemberton v. Roe, | (o) Newsom v. Graham, 10 B. & C. 234. |

statutes apply, or in which the landlord does not choose to avail himself of their provisions, the method of proceeding in ejectment is as follows: A lease for years being previously prepared, and (unless the lessor attends in person, a power of attorney executed) the party claiming title, or his attorney, must enter upon the premises and there seal and deliver the lease to the lessee, who is usually some friend of the lessor; (but for the prevention of maintenance it is ordered, "that no attorney shall be the lessee;) (o) and at the same time possession is formally delivered. The lessee remains on the premises until some third person enters thereon by previous agreement, and turns him out of possession, upon which the copy of a declaration in ejectment, which has been previously prepared, is delivered on the premises to the ejector, founded upon the demise contained in the lease. The declaration is similar to that in ordinary cases, except that the parties to it are real, and not fictitious persons; the lessee being made plaintiff on the demise of the lessor, and the ejector defendant. In lieu of the ordinary notice for the tenant to appear and be made defendant instead of the casual ejector, a notice is subscribed to the declaration, signed by the plaintiff's attorney, and addressed to the real defendant, informing him that unless he appear in Court at the suit of the plaintiff, and plead to the declaration, judgment will be entered against him by default. (p) In cases of vacant possession no person claiming title will be let in to defend; but he that can first seal a lease upon the premises must obtain possession. (q)

In moving for a judgment against the defendant, in case of a vacant possession, in the King's Bench, an affidavit must be made of the sealing of the lease, the entry of the lessee and ouster, and the delivery of the copy of the declaration; and also, of the execution of the power of attorney, if the entry be made by a third person; but in the Common Pleas such an affidavit is unnecessary, it being only requisite

(o) Rules 1654. § K. B. & C. B. Adams Eject. 201, 3rd edit. Selw. *et vide* Adams Eject. 200, 3rd edit. N. P. 736, 9th edit.

(p) Tidd's Pr. 1201, 9th edit. (q) Barnes, 177. Bull. N. P. 96.

to give a rule to plead as in common cases : (r) and it is said that by the course of that Court no defence can be made in this case, except by the defendant in ejectment, who is the real ejector. (s)

Ejectment cannot be maintained as on a vacant possession, where there is any thing left by the tenant on the premises, however trifling, for almost any matter will suffice to prevent a vacant possession; (t) as if the tenant leave beer in a cellar, or hay in a barn; (u) and in case of ground on which there is no house or building, if it be known where the tenant lives, the lessor of the plaintiff cannot proceed as on a vacant possession. (v)

Where the premises are wholly unoccupied, it is not necessary for the claimant, having the *right of possession*, to proceed by ejectment; for, as we have already seen, he may enter upon the premises unaided by the law, if he can find an opportunity of doing so, *without using force*; and if trespass be brought against him, he may justify the entry under his title. (w) And even if he use force by breaking open the door, although he may be subject to an indictment, yet the tenant cannot recover back the possession. (x)

By a general rule of all the Courts, (y) declarations in ejectment may be served before the first day of any term; and, thereupon, the plaintiff shall be entitled to judgment against the casual ejector, in like manner as upon declaration served before the essoin or first general return day.

Statutory
General rules
of Court.

And by another general rule, a writ of *habere facias*

(r) Tidd's Pr. 1202, 9th edit. 431; and see Taylor v. Cole, 3 T. R. 292. Rogers v. Pitcher, 6 Taunt. 202.

(s) Tidd, *ibid.* Bul. Ni. Pri. 95.

(t) *Per* Dampier, J. Doe dem. (x) Turner v. Meymott, 1 Bing. 158.

(u) Savage v. Dent, 2 Str. 1064. (y) See 2 B. & Ad. 789. 7 Bing. 784. 1 Crompt. & Jer. 472. Tidd's

(v) *Ibid.*

New Prac. 626, &c.

(w) Taunton v. Costar, 7 T. R.

possessionem may be sued out without lodging a *præcipe* with the officer of the Court. (x)

And by another general rule, it is no longer necessary that any writ of execution should be signed by the signer of writs in the King's Bench, or the Prothonotaries in the Common Pleas, but no such writ shall be sealed till the judgment paper, *postea*, or inquisition has been seen by the proper officer. (a)

And by another general rule, in order to make the practice of the different Courts the same, the recognizance of bail in error in ejectment is to be taken in double the yearly value and double the costs. (b)

1 Wm. IV.
c. 70.

By the 11 Geo. IV., and 1 Wm. IV. c. 70, (c) it is enacted, that in all trials of ejectment at *nisi prius*, where a verdict shall be given for the plaintiff, or the plaintiff shall be nonsuited for want of the defendant's appearance to confess lease, entry and ouster, it shall be lawful for the judge, before whom the cause shall be tried, to certify his opinion on the back of the record, that a writ of possession ought to issue immediately; and upon such certificate, a writ of possession may be issued forthwith, and the costs may be taxed and judgment signed and executed afterwards at the usual time, as if no such writ had issued. Provided that such writ, instead of reciting a recovery by judgment in the form then in use, shall recite shortly that the cause came on for trial at *nisi prius*, at such a time and place, and before such a judge (naming the time, place, and judge,) and that, thereupon, the said judge certified his opinion that a writ of possession ought to issue immediately.

On this statute it has been held, that the judge must either grant his certificate for immediate possession or let the law

(x) See 3 B. & Ad. 385. 8 Bing.
299. 2 Crompt. & Jer. 189. Tidd's
New. Prac. 638.

(a) *Ibid.*
(b) *Ibid.*
(c) Sect. 38.

take its course. (c) And that in case of nonsuit by plaintiff for want of the defendant confessing lease, entry and ouster, the judge will require an affidavit stating the circumstances of the case (d)

By the general rule in Hilary Term, 4 Wm. IV., after reciting, that by the mode of pleading thereafter prescribed, the several disputed facts material to the merits of the case, will, before the trial, be brought to the notice of the respective parties more distinctly than theretofore, and that by the act of the 3 & 4 Wm. IV. c. 42, s. 23, the powers of amendment at the trial in cases of variances in particulars, not material to the merits of the case, are greatly enlarged, it is ordered, that several counts shall not be allowed, unless a distinct subject matter of complaint is intended to be established in respect of each, nor shall several pleas or avowries or cognizances be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each. Therefore, counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstance only, are not to be allowed.

Statutory
general rule
as to form of
declarations.

SECTION VII.

OF THE TENANT'S DEFENCE.

When a party is sued as tenant, there are four grounds of defence, upon any of which he may take his stand against the plaintiff.

The ground
of defence
four-fold.

I. That the relation of landlord and tenant never existed between them.

II. Admitting the existence of the relation of landlord and tenant, that the landlord is not in a condition to enforce the performance of the tenant's covenant or agreement.

(e) *Doe dem. Williamson v. Dawson*, 4 C. & P. 589. *Doe dem. Packer v. Hilliard*, 5 C. & P. 132.

(d) *Doe dem. Williamson v. Dawson*, *supra*.

III. That the tenant has not broken his obligation, covenant, or contract ; or has not been guilty of the *tort* with which he is charged.

IV. Admitting that he has broken the obligation, &c., or has been guilty of the *tort* with which he is charged, that he has been discharged by matter *ex post facto*.

I. Denial of the relation of landlord and tenant.

I. He may deny that the relation of landlord and tenant ever existed between him and the plaintiff.

1. Plaintiff's want of title,

cannot be made ground of defence after defendant has recognized plaintiff as his landlord.

The plaintiff may have no interest in the land ; and consequently, being a mere stranger, may have no right to charge the defendant for his occupation of the premises, or for any wrong done towards the estate. Supposing the defendant, therefore, to have done no act recognizing the title of the plaintiff, he may avail himself of the plaintiff's want of title, and shew this in his defence. But when the defendant has once recognized the title of the plaintiff, and treated him as his landlord, either by accepting a lease, paying rent, or the like, he is for ever precluded from shewing that the plaintiff had no title at the time of the demise ; (e) it being a general rule that a tenant shall never be permitted to controvert or

(e) That the payment of rent will be *prima facie* evidence of a tenancy, *vide* *Townsend v. Davis*, Forest. 120. *Doe dem. Brune v. Prideaux*, 10 East, 158. *Doe dem. Jackson v. Wilkinson*, 3 B. & C. 413 ; unless it appear that it may be referred to some other consideration than that of the relation of landlord and tenant. *Right dem. Dean and Chapter of Wells v. Bawden*, 3 East, 260. The defendant, however, may rebut such evidence by shewing that he paid the rent under a mistake. *Rogers v. Pitcher*, 1 Marsh. 541. S. C. 6 Taunt. 202. *Fenner v. Duplock*, 2 Bing. 10. *Gregory v. Doidge*, 3 Bing. 474. *Gravenor v. Woodhouse*, 1 Bing. 38. See *Chettle v. Pound*,

Ld. Raym. 746. And where, in ejectment to recover two pieces of land, it appeared that the lessor of the plaintiff was lord of the manor of B. and in order to shew that the defendant was his tenant, evidence was given of payment by the defendant of a rent of 2s. for one piece of land, and of a rent of 4s. 3d. for the other piece, which several rents had been paid without variation from 1780 until 1819, Holroyd, J., ruled, that this was evidence of a title to the rents, but not to the land, the presumption being that the rents were quit rents. And on a motion for a new trial, the courts above acquiesced in this opinion. *Doe dem. Whittick v. Johnson*, Gow's N. P. 173.

raise objections to his landlord's title ; which rule extends to all parties claiming under the lessor or lessee ; so that the lessee's assignee, or under-tenant, cannot object to the title of the lessor, or of his assignee, any more than the lessee himself could. (*f*)

And if the tenant in possession comes in under a party who has paid rent by distress to the landlord, the tenant is estopped from disputing in replevin the landlord's title, although the latter should inadvertently put in evidence a deed which shewed that the party through whom the tenant claimed occupied under a lease, to which the landlord was *at law* a stranger, as for example, if the lease was granted by parties having an equitable interest only, and the landlord obtained a conveyance from the parties having the legal estate. (*g*) And so, if a party claiming title obtain possession from a tenant of the lessor of the plaintiff, he is estopped in ejectment from setting up his adverse title against the title of the landlord. (*h*)

It has been held, that the lessee cannot shew that his lessor had only an equitable title. (*i*) In another case it was determined, that a plea, setting forth a conveyance in fee made by the lessor before he had executed the lease, was bad, being tantamount to a plea, that he had no interest in the premises when he made the lease. (*k*) So the tenant cannot defend an ejectment against the landlord, or those claiming under him, upon a supposed defect of title ; (*l*) or upon an allegation, that it was part of the waste taken in by a prior-tenant ; (*m*) nor can the tenant of glebe lands in

Lessee cannot show his lessor had only an equitable use.

(*f*) *Palmer v. Ekins*, Ld. Raym. 1550. S. C. Str. 817. *Lewis v. Willis*, 1 Wils. 314. *Barwick dem. Mayor, &c. of Richmond v. Thompson*, 7 T. R. 488. *Parker v. Manning*, *ibid.* 537. *Taylor v. Needham*, 2 Taunt. 278. *Hodson v. Sharpe*, 10 East, 350. *Doe dem. Clarke v. Grant*, 12 East, 221. *Wood v. Day*, 1 Moore, 389.

(*g*) *Cooper v. Blandy*, 1 Bing.

N. S. 45.

(*h*) *Doe dem. Bullen and another v. Mills*, 2 Ad. & Ell. 17. 1 M. & Rob. 385. 4 Nev. & M. 25.

(*i*) *Blake v. Foster*, 8 T. R. 487.

(*k*) *Palmer v. Ekins*, Ld. Raym. 1550. S. C. Str. 817. 1 Barn. 113.

(*l*) *Driver dem. Oxendon v. Lawrence*, Bl. Rep. 1259.

(*m*) *Et vide Doe dem. Wheble v. Fuller*, 1 Tyr. & Gr. 17.

an action for use and occupation, set up as a defence, that the incumbent to whom he has paid rent was simoniacally presented. (n) Upon the same principle it has been held that, in covenant by the assignees of a bankrupt lessor, the lessee cannot plead that the lessor, at the time of making the lease, had become bankrupt, and so had no estate. (o) And where A. hired apartments of B., and B. afterwards let the whole house to C., it was held that in assumpsit by C., for use and occupation, A. could not impeach C.'s title. (p)

If a party mortgage his lands, and then make a lease, and the mortgagee gives the tenant notice not to pay the rent to the mortgagor, it has been a question whether the tenant can, in an action against him by the mortgagor, justify the payment, and it seems he may. It was so held in *Pope v. Briggs*; (q) and although that case is supposed to be overruled by *Partington v. Woodcock*, (r) yet it is distinctly recognized in *Waddilove v. Barnett*. (s)

Exceptions.

Where, however, land belonging to a parish was occupied by A., and he paid rent to the churchwardens, and they executed a lease of the same land to B. and gave A. notice of the lease; it was held, in an action for use and occupation by B. against A., that A. was not estopped, by having paid rent to the churchwardens, from disputing B.'s title; and that B. could not derive a valid title from the churchwardens; for a man cannot, by paying rent to them, make them a corporation, when they are not so by law. (t)

And if on the face of the instrument itself it appears that at the time of executing the agreement the party had no power to grant a lease, it shall not operate as such. (v)

(n) *Cooke v. Loxley*, 5 T. R. 4.

C. 245.

And see *Brooksby v. Watts*, 2 Marsh.

(r) 5 Nev. & M. 672.

38. S. C. 6 Taunt. 333.

(s) 2 Bing. N. S. 538.

(o) *Parker v. Manning*, 7 T. R. 537.

(t) *Phillips v. Pearce*, 5 B. & C. 433.

(p) *Rennie v. Robinson*, 1 Bing. 147.

(v) *Hayward v. Haswell*, 1 Nev. & P. 411.

(q) 4 Man. & Ry. 193. 9 B. &

Where a copyholder has been admitted to a tenement, and done fealty to the lord of a manor, he is estopped, in an action by the lord for a forfeiture, from shewing that the legal estate was not in the lord at the time of admittance. (u) Copyholder.

So the Court of King's Bench decided that a lessee of land in the Bedford Level cannot object that the lease was void by the statute 15 Car. II. c. 17, enacting, that "no lease should be of force but from the time when it should be registered;" because this enactment does not avoid the lease as between the parties themselves, but merely postpones it to the subsequent incumbrances of those who have previously registered their title. (v) And where premises had been let to B. for a term determinable by a notice to quit, and pending such term C. applied to A. the landlord, for leave to become the tenant instead of B., and upon A.'s consenting, agreed to stand in B.'s place, and offered to pay rent, the Court held that although B.'s term had not been put an end to, C. could not set up the title of B. as a defence to an action for use and occupation by A. the landlord. (w) Bedford Level.

On the like principle, where a party took premises under an agreement from A. and B., describing themselves as agents for the trustees of the joint estate of C. and D., and in an action by those trustees for use and occupation, parol evidence was given by the plaintiffs themselves, shewing that at the date of the agreement, they were trustees for C. only, it was held that the tenant could not take advantage of the discrepancy. (x)

But though the defendant cannot shew that his lessor *never had* title to the demised premises, he may, on admitting that he once had a title, shew that his interest has *expired*. As if the lessor being tenant *pur autre vie*, bring debt The tenant may shew landlord's title has expired.

(u) Doe dem. Nepean v. Budden, 5 B. & A. 626. & A. 50.

(v) Hodson v. Sharpe, 10 East, 350. (x) Fleming and others v. Gooding, 10 Bing. 549. 4 Moore & Sc. 456, *et vide* Doe dem. Johnson v.

(w) Phipps v. Sculthorpe, 1 B. Baytrup, 4 Nev. & M. 837.

against the lessee for rent accruing since the death of *cestui que vie*, the tenant may shew (not that the lessor never had title, but admitting that he once had title) that the interest of the lessor is at an end; (y) or if tenant in tail grant a lease for ninety-nine years, and covenant for quiet possession, and subsequently to his death the term is assigned to A., who brings action against the executor of the tenant in tail on the covenant, the executor may shew that the lease had determined at the date of the assignment, so that no interest passed by it; (z) or if lessor being tenant for life only, grant a lease for twenty-one years, and the lessee covenant at the end of the term to surrender up possession to the lessor, his heirs, or assigns, he may, on the death of the lessor, in an action of ejectment by the devisee of the lessor, shew his interest to have determined. (a) Where, therefore, the heir of the lessor brought covenant for want of repairs, and the defendant pleaded that the lessor was only tenant for life, and traversed that the reversion was in him and his heirs, the Court held this to be a good plea. (b) And the lessee may shew that the lessor was only seised in right of his wife for her life, and that she died before the covenant was broken. (c)

So in ejectment by the landlord against the tenant, the tenant was permitted to shew that the landlord's title had expired; though it was agreed that he could not have been permitted to shew that the landlord never had any title. (d) And in a modern case, Lord *Ellenborough*, C. J., held, that the tenant in ejectment might shew that his landlord had disposed of his interest during the term. (e) On a former occasion, however, where to an action for use and occupation of a copyhold tenement, the tenant offered to prove that two

(y) *Vide* Co. Lit. 47. b. Treport's case, 6 Rep. 15. a. 2 Saund. 418. n. (1).

(z) *Andrew v. Pearce*, 1 N. R. 158.

(a) *Doe dem. Strode v. Seaton*, 2 C., M. & R. 728. 4 Nev. & M.

(b) *Brudnell v. Roberts*, 2 Wils.

143.

(c) *Vide Blake v. Foster*, 8 T. R. 487.

(d) *England dem. Syburn v. Slade*, 4 T. R. 682. S. P. *Doe dem. Jackson v. Ramsbotham*, 3 M. & S. 516

(e) *Doe dem. Lowden v. Watson*, 2 Stark. 230.

years before the action was commenced, the copyhold was seized as forfeited into the hands of the lord, and that having notice to pay the rent to the lord, he had regularly done so ever since, Lord *Ellenborough* would not admit this evidence, because he had not disclaimed holding of the plaintiff, and entered afresh under the lord. (e)

If the lessor, after the lease, convey away his estate, though by way of mortgage only, the tenant may shew that fact in defence against an ejectment by his landlord for a forfeiture. (f)

In a recent case it was held, that if a party having an equitable title, grants a lease, and afterwards obtains a conveyance of the legal title, and subsequently conveys the inheritance to another, the tenant is not estopped from shewing that the lessor was not in a situation to grant over the same reversion as was expectant on his lease. (g)

If a tenant pays rent to a party claiming under an agreement with his landlord for a lease, he may afterwards justify a refusal to pay subsequent accruing rent, by shewing the agreement has been determined. (h)

On the same principle, in an action of assumpsit for use and occupation, a tenant may *give in evidence*, that his landlord had mortgaged the premises before the defendant came into occupation, and that the mortgagee had given him notice not to pay any rent becoming due after the notice. But as to rent due before the notice, obedience to the mortgagee's order for payment of it to him must be specially *pleaded*. (i)

If the lessee is evicted by title paramount to his lessor, and afterwards holds under a distinct agreement with the

Title paramount.

- (e) *Balls v. Westwood*, 2 Camp. N. S. 411.
 11. (h) *Brooks v. Biggs*, 2 Bing. 572. N. S.
 (f) *Doe dem. Marriott v. Edwards*, 5 B. & Ad. 1065. (i) *Waddilove v. Barnett*, *ibid.* 538.
 (g) *Whitton v. Peacock*, 2 Bing.

superior landlord, he may give these facts in evidence on an issue of non tenuit, and need not specially plead them. (i)

2. The defendant not chargeable as tenant.

When the defendant is charged as assignee either in fact or in law, he may deny that the assignment was ever made to him, or that he was ever executor, &c. And if he is charged as devisee, he may shew that he has disclaimed. (k)

Infancy.

2. If the landlord seek to recover in a covenant, the defendant may shew that the covenant is void upon the ground of his infancy, because he will not be bound by any covenant he may then have entered into. (l) But if an infant be charged in debt for rent, or in *assumpsit* for use and occupation, his infancy will afford him a defence in case only that he can shew the premises demised to have been unnecessary, or unfitting his situation; for lodging will be necessary for an infant: (m) and as a demise to an infant is voidable only, it must be shewn that he renounced the lease after he came of full age; for if it appear that after that time he continued to occupy, he will be liable to all the arrears of rent incurred during his minority. (n) This defence must be specially pleaded. (o)

II. Excuse for non-performance.

II. Admitting the relation of landlord and tenant, the defendant may shew that something has occurred to discharge him from the performance of his covenant or agreement.

Suspension of rent by eviction.

1. He may shew that he has been evicted, and kept out of the demised premises by the lessor, or by a stranger having lawful title; and that the rent is thereby suspended. (p) So he may shew that before the rent became due, a judg-

(i) *Hopcraft v. Keys*, 9 Bing. 613. 2 Moore & Sc. 760.

(k) *Townson v. Tickell*, 3 B. & A. 31. And he may disclaim by deed without matter of record, *ibid.*

(l) Com. Dig. *Infant* (C.)

(m) *Crisp v. Churchill*, cited 1 B. & P. 340.

(n) *Kettle v. Elliot*, 1 Rol. Abr.

731, l. 47. S. C. (*Ketsey's case*.) Cro. Jac. 320. (*Kirton v. Elliot*.) 2 Bulstr. 69.

(o) Bull. N. P. 172.

(p) *Strowd v. Willis*, Cro. Eliz. 362. *Bateman v. Allen*, *ibid.* 437. *Dalston v. Reeve*, Ld. Raym. 77. *Hayne v. Maltby*, 3 T. R. 442. *Burn v. Phelps*, 1 Stark. 94.

ment had been obtained against the lessor, and that the land was taken under an *elegit*. (q) But it must appear that an eviction has actually taken place; for a mere trespass or disturbance by a stranger, or even by the lessor himself, will not suspend the rent; (r) and therefore if the lessor enter and destroy a building upon the premises, this is no cause of suspension of the rent; (s) but where the lessor railed off part of the land demised, (t) and also in another case, where the landlord gave notice to his lessee's under-tenant to quit, which the under-tenant accordingly did; (u) Lord *Ellenborough*, C. J., ruled, that the act of the lessor in both cases amounted to an eviction, and consequent suspension of the rent.

Where a tenant from year to year, at a rent payable half-yearly, without giving any notice to the landlord, quitted the premises at the expiration of the current year; and before the next half year expired, the landlord let the premises to another tenant, who occupied the same, it was held, that the landlord was not entitled to recover rent from the first tenant from the expiration of the current year, when he quitted the premises, to the time when the landlord re-let the same to the second tenant; for by letting the premises to another person, the landlord shewed that he did not choose to consider the defendant as his tenant any longer, and as no rent was at the time of the re-letting *due*, he was to be considered as having abandoned any claim which he might otherwise have acquired, in respect of the time which had elapsed between Michaelmas, 1824, and the subsequent letting. (v)

As between the lessor and *lessee*, an eviction out of *part* of the lands by the lessor, or any person claiming through him, will operate as a suspension of the *whole*

Eviction of
part.

(q) *Day v. Austin*, Cro. Eliz. 398.

(t) *Smith v. Raleigh*, 3 Camp.

(r) *Reynolds v. Buckle*, Hob.

513.

326. *Roper v. Lloyd*, Sir T. Jones,

(u) *Burn v. Phelps*, 1 Stark. 94.

148. *Bushell v. Lechmore*, Lord

(v) *Hall v. Burgess*, 5 B. & C.

Raym. 369. *Hunt v. Cope*, Cowp.

332, and see *Walls v. Atcheson*, 3

242. And see *Penn v. Glover*, Cro.

Bing. 462; but see also *Harland v.*

Eliz. 421, and *Taylor v. Zamira*, 6

Bromley, 1 Stark. 455. *Redpath v.*

Taunt, 524.

Roberts, 3 Esp. 225, and *Griffith v.*

(s) *Hunt v. Cope*, Cowp. 242.

Hodges, 1 C. & P. 419.

rent, (v) although a mere trespass does not; (w) and the tenant will be liable for the rent which accrued before the eviction. (x) And it seems, that where there is no demise *by deed*, if after the eviction out of *part*, the tenant continue to occupy the residue of the demised premises, he may be charged for such occupation upon a *quantum meruit*. (y) But as between the lessor and *assignee*, where the lessor's right to the rent depends solely upon the privity of *estate*, an eviction out of part will not suspend the rent *in toto*, but the assignee will be liable to be charged either in debt or in covenant, for the rent payable in respect of the residue of the lands demised. (z) And if the *lessee* be evicted out of part of the land by *title paramount*, this will only operate as a suspension of the rent *pro tanto*. (a)

It has been decided, that if the eviction be of part of the thing demised, out of which no rent issues, this will not operate as a suspension of any part of the rent; as if a lease be made of lands with right of common, and the lessee be evicted of his right of common, the rent is not suspended. (b) It was, indeed, on one occasion, laid down as law at the bar, that where a barn was leased, together with tithes, at a rent of 100*l.* although no rent issued *out of* the tithes, yet as part of the rent was payable *in respect of* the tithes, an eviction of these would make the rent *apportionable*; for otherwise the lessee would pay 100*l.* a year for the barn, which perhaps might not be of the yearly value of 40*s.*, which would be against all reason and justice. (c) And in *Dalston v. Reeve*, (d) it was decided, that eviction was a good plea to an action of covenant for rent payable upon a demise of *tithes*. In this latter case, however, the demise was of tithes only, and there was nothing else demised with them out of which the rent could issue.

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|------------------------------------|---------------------------------|
| (v) Dorrell v. Andrews, Hob. | East, 575. |
| 190. Cibil v. Hill, 1 Leon. 110. | (a) Co. Lit. 148. b. |
| (w) See Selw. N. P. 520, 9 edit. | (b) Sanderson v. Harrison, Cro. |
| (x) Baynton v. Bobbit, 2 Vent. 68. | Jac. 679. |
| (y) Stokes v. Cooper, 3 Camp. | (c) Dean, &c. of Windsor v. |
| 514. n. | Gover, 2 Saund. 303. |
| (z) Stevenson v. Lambard, 2 | (d) 1 Ld. Raym. 77. |

Though eviction out of part of the thing demised is a good defence for the tenant to an action for rent, it is no answer to an action for breach of covenant to repair, &c., unless it be shewn that the lessee has been evicted from that part of the land where the repairs were to be done, and so prevented from fulfilling his covenant. (e) Where the tenant was evicted by title paramount, the Court thought this a good defence to an action of covenant for not delivering up the premises at the end of the term. (f)

When the lessee has been once evicted, the rent will be suspended *in futuro*, although the obstacle to his re-entry be removed; and, therefore, it was decided, where the defendant pleaded that the lessor entered and *held him out*, that the entry of the lessor was enough to satisfy the averment of holding out, and that it suspended the rent, although it appeared that the lessor retired from the land immediately after the lessee's eviction. (g) But it was admitted in this case, that the re-entry of the lessee will revive the rent. In a case already noticed, where the lessor gave notice to the lessee's under-tenant to quit, which he accordingly did, and the land remaining vacant for a year the lessee re-entered. Lord *Ellenborough* was of opinion, that he might have pleaded eviction to an action for use and occupation of the premises during the year they remained vacant. (h)

Revival of
rent.

It has been already noticed that a mere trespass will not suspend the rent. (i)

2. The defendant may shew that the term for which he held is expired by effluxion of time, surrender, or entry for forfeiture, and his liability consequently at an end. But if the defendant is charged with a breach of covenant for non-payment of rent, and he has surrendered the term *after some*

2. Tenant may
shew determi-
nation of his
interest.

By surrender,
&c.

(e) *Carrel v. Read*, Cro. Eliz. 374. *Snelling v. Stagg*, Bul. N. P. 165. a.

(g) *Cibil v. Hill*, 1 Leon. 110.

(h) *Burn v. Phelps*, 1 Stark. 94.

(i) *Supra*, p. 608.

(f) *Andrews v. Needham*, Noy, 75.

part of the rent became due, he cannot plead his surrender in bar of the whole action; for the breach is not entire, but the plaintiff may recover by proving part of it. (*k*)

By assignment. He may shew that, before the rent became due, or before the breach of covenant, he assigned the estate, and so discharged himself, and wherever the defendant is charged upon the privity of estate only, this will be a good plea; and consequently it is always competent to an assignee (who is chargeable in this respect only) to set up an assignment in his defence. (*l*) To the lessee such defence is never open when sued upon his covenants; for upon these he always continues liable, notwithstanding his assignment. (*m*) But if sued in *debt*, he may shew that he has assigned with the assent of the landlord, either express, or implied, by his recognition of the assignee as his tenant. (*n*) For though during the tenancy there is a privity of contract between the lessor and lessee, upon which the lessor may maintain debt, yet this contract being affixed to the estate is only kept alive so long as the privity of estate exists between them. (*o*) But since it is not competent to the tenant, by his own act, to put an end to the privity of estate, it follows that he must shew the dissolution of that privity, in order to discharge himself from his liability upon the contract depending thereupon. (*p*)

Under the statutes of bankruptcy.

Prior to 49 Geo. III. c. 121, the lessee after his bankruptcy though discharged from his liability upon privity of estate, remained liable upon the express covenants in the lease. (*q*) By the 19th section of that statute, if the assignees accepted the lease, the bankrupt was discharged from the covenants and conditions therein; though, if the assignees refused to adopt it, the bankrupt was still liable for breaches of covenant, subsequent to his bankruptcy, unless the *lessor*

(*k*) *Barnard v. Duthy*, 5 Taunt. 27.

(*l*) *Pitcher v. Tovey*, 1 Show. 340. 12 Mod. 23, *vide supra*, 309, 491, 495.

(*m*) *Bachelour v. Gage*, Cro. Car. 188. *Orgil v. Kemshead*, 4 Taunt. 642, *et supra*, 533.

(*n*) *Marrow v. Turpin*, Cro. Eliz. 715. S. C. Moore, 600. *Marsh v. Brace*, Cro. Jac. 334. *Thursby v. Plant*, 1 Saund. 240, *et supra*, 495.

(*o*) *Walker's case*, 3 Rep. 22. a.

(*p*) *Vide supra*, 308, 309, &c.

(*q*) *Auriol v. Mills*, 4 T. R. 94.

applied to the Court of Chancery to have the lease delivered up, as by the statute he was empowered to do. But by the bankrupt act of the 6 Geo. IV. c. 16, (r) if the assignees refuse to accept the lease, the bankrupt is discharged if he delivers up the lease to the lessor within fourteen days after notice of their refusal.

III. The third head of defence admits the title of the plaintiff, and the existence of the relation of landlord and tenant; but shews that the defendant is not liable to be charged for the non-payment of rent, or breach of covenant, or agreement, or that he has not been guilty of the *tort*.

III. He may deny breach of covenant, or commission of tort.

1. He may shew that there has been no breach of covenant, &c., because his liability to perform his covenant never attached, in consequence of some condition precedent to be performed by the lessor, which has not as yet been performed. (s) Thus, to an action for not repairing he may shew that the lessor was bound to furnish him with timber for the repairs, and that he had refused to do so. (t) Such condition precedent, however, must affect the whole consideration, otherwise it will be no bar to the action. (u)

I. His liability, never having attached.

Where the landlord charged the tenant with a breach of the covenant to repair *per quod* he was put to expense, and the tenant pleaded that the repairs became necessary, not by his neglect, but under the building act, 14 Geo. III. c. 78, the tenant not being the owner of the improved rent (and consequently not liable to such repairs without an express covenant), (v) the Court held this a good plea, and that if there were any thing, to charge the defendant with such repairs, the plaintiff ought to reply it. (w)

Or, 2. Admitting that his liability attached, he may deny

2. That he has performed his contract.

(r) Sect. 75.

(u) 1 H. Bl. 270. Campbell v.

(s) Duke of St. Albans v. Shore, 1 H. Bl. 270.

Jones, 6 T. R. 570, *et vide supra*, 540.

(t) *Vide* Brailsford v. Parsons, Lutw. 316.

(v) *Supra*, 249.

(w) Moore v. Clark, 5 Taunt. 90.

that he has broken his covenant or agreement, or that the rent is in arrear; or that he has been guilty of such a tort as is charged upon him.

Payment of
the rent.

1. He may shew with reference to his liability for the rent, that he has paid it; or that he was upon the land until sun-set upon the day on which it became due, ready to pay it, in case any one had appeared to receive it. But it is not enough to say that he was on the premises at and a short time before sun-set, without averring that he was there long enough before sun-set to have counted the money. (*x*) And in the action of debt where the plaintiff seeks to recover the very rent itself, it is sufficient to shew payment *after* the day on which it became due, or that the lessor distrained upon him, and so satisfied his demand. (*y*) But neither of these defences would avail him in covenant, because there the plaintiff seeks damages for the defendant's breach of his covenant; and the plea would itself amount to an admission that he had broken it. (*z*) But in any form of action an undertenant may shew that *before* the rent became due, the superior lord (*a*) or the grantee of a rent-charge, (*b*) threatened to distrain for rent due from the lessor, and that he paid him the rent to save his own goods. And a payment of this sort does not constitute a cross demand, but amounts to *payment* of so much of the occupier's rent, (*c*) and *growing* rent may be discharged by such payments, as well as rent actually due. (*d*) It must, however, be shewn to have been a compulsory, not a voluntary payment; but it will not be the less a compulsory payment, because the landlord, on demanding it, allows the occupier time to pay. (*e*) In like manner, if the occupier has paid the land tax according

(*x*) *Per* Gibbs, J., in *Tinkler v. Prentice*, 4 Taunt. 549.

(*y*) *Core's case*, Dyer, 20. *b. Cecil v. Harris*, Cro. Eliz. 140. *Dyke v. Sweeting*, Willes, 585.

(*z*) *Hare v. Savill*, 1 Brownl. 19. 2 Brownl. 273, and see *Warner v. Theobald*, Cowp. 589.

(*a*) *Sapsford v. Fletcher*, 4 T. R.

511. *Cobb v. Carpenter*, 2 Camp. 13. n.

(*b*) *Taylor v. Zamira*, 6 Taunt. 524, and see *Pope v. Biggs*, 9 B. & C. 245.

(*c*) *Ibid.*

(*d*) *Carter v. Carter*, 5 Bing. 406.

(*e*) *Ibid.*

to the directions of the act, he may deduct each annual payment out of the annual rent. (*f*)

Where the landlord's estate has been conveyed to trustees, for a person of whose title *the tenant has had notice*, it is no defence to an action for use and occupation by the trustees that the tenant has paid the rent to the landlord although he had no notice of the legal title being in the plaintiffs on the record. (*g*)

When the tenant is charged, upon his covenant not to plough the meadow land, for ploughing up a certain piece of ground described in the lease as meadow, he will not be estopped by the description in the lease, from setting up as a defence that such piece of land is arable, (*h*) although the description in the lease will be *prima facie* evidence of the state of the land. (*i*)

IV. Admitting that he has broken his covenant or contract, the tenant may shew that he has been discharged by matter *ex post facto*. IV. Discharge by matter *ex post facto*.

Where he is charged for use and occupation, or on any agreement, not under seal, or for any tort, he may shew that it is six years since the accruing of the action, and that it is barred by the Statute of Limitations, 21 James I. (*k*) By section 3 of that statute actions of *debt* for arrearages of rent shall be commenced within six years next after the cause of action accrued; but this extends only to actions of debt for rent where the demise is without deed, and not when the rent is reserved by specialty. (*l*) By the 3 & 4 Wm. IV. however, all actions of debt for rent upon an indenture of demise shall be commenced and sued within ten years after the end of

(*f*) *Andrew v. Hancock*, 1 B. & B. 37. *Spragg v. Hammond*, 2 B. & B. 59. *Stubbs v. Parsons*, 3 B. & A. 516, *et vide supra*, 275.

(*g*) *Lumley v. Hodgson*, 16 East, 99.

(*h*) *Skipwith v. Green*, Str. 610.

(*i*) *Birch v. Stephenson*, 3 Taunt. 469.

(*k*) 21 Jac. I. c. 16.

(*l*) *Freeman v. Stacy*, Hutt. 109. *et vide Selw. N. S.* 613, 9th edit.

1. By the statute of limitations.

the then present session, or within twenty years after the cause of such action or suit but not after. (*k*)

A. being tenant from year to year of certain premises, died ; B., his executor, thereupon entered and occupied the premises, paying rent until the year 1806, when he quitted, without giving or receiving any notice to quit. C. then entered ; but the landlord expressly *refused to receive* him as his tenant ; and when he paid his rent, gave receipts *as for the payment of B.* C. left the premises in 1808, after which, for more than six years, no one actually occupied the premises, or paid rent. The Court held, that as there was no proof of B.'s being tenant within the last six years, the statute of limitations was an answer to an action of assumpsit against B. for use and occupation. (*l*)

2. By tender.

2. He may shew a tender and refusal of the rent or damages before action brought. If the defendant has neglected to pay his rent at the appointed time, a tender before action brought and profert of the rent will be sufficient defence, whether it is demanded in an action of debt or covenant. (*m*)

3. By release.

3. He may shew a general release from the plaintiff of all demands, or of the particular cause of action. If it be a general release of all demands, it must be shewn to have been given after the covenant broken ; because as no cause of action arises upon the covenant until it be broken, there can be no demand thereupon until after breach. (*n*) So growing rent will not be discharged by a general release given before the rent has become due. (*o*) But a release of all covenants, or of a particular covenant, will be a good release of the covenant before it be broken. (*p*)

(*k*) Sec. 3, *et vide* Paget v. Foley, 2 Bing. 629. N. S. *et supra*, 25, 490.

(*l*) Leigh v. Thornton, 1 B. & A. 625.

(*m*) Keating v. Irish, Lutw. 593. Johnston v. Clay, 1 Moore, 200. 7 Taunt. 486, *et vide* Hume v. Pep-

loe, 8 East, 168. Rivers v. Griffiths, 5 B. & A. 630.

(*n*) Co. Lit. 292. *b.* Eccles v. Lambert, Aleyn, 38. Henn v. Hanson, 1 Lev. 99.

(*o*) Stephens v. Snow, 2 Salk. 576.

(*p*) Co. Lit. 292. *b.*

If after the lessor has granted over the reversion, the tenant is guilty of a breach of a covenant running with the land, a release of such covenant by the lessor will be no bar to an action for the breach at the suit of the grantee if made subsequent to the commencement of the action. (*q*)

Where the contract is under seal, the release must also be by deed. Therefore, where in an action of covenant for not erecting a threshing mill, the defendant pleaded that, whilst he was so doing, the plaintiff desired him not to erect it, the plea was held bad on demurrer. (*r*)

4. The tenant may shew an accord and satisfaction *after* the breach of covenant or commission of the wrong charged upon him. (*s*)

4. By accord and satisfaction.

To an action for a breach of covenant in not repairing, the defendant having pleaded an accord and satisfaction after the breach, it was objected that the action, being founded upon a deed, could be discharged by deed only. But it was decided that the plea was good. It was agreed that where the action is founded solely upon a specialty, and the duty accrues and is ascertained at the time of making the writing, as by a covenant bond or bill for the payment of a certain sum, it could be discharged only by a matter of a nature equally high. But where no certain duty accrues by the deed, but a wrong or subsequent default, together with the deed, gives an action to recover damages, accord and satisfaction is a good plea. And it was laid down, as a general rule, that in all actions where damages are the subject matter of the action, as in waste, &c., the defendant may discharge himself by plea of accord executed. (*t*)

(*q*) *Vide* Middlemore *v.* Goodale, Cro. Car. 503.

(*r*) Cordwent *v.* Hunt, 8 Taunt. 596.

(*s*) *Vide* Selw. N. P. 518, 9th edit.

(*t*) Blake's case, 6 Rep. 41. *a.*

S. C. (Alden *v.* Blague), Cro. Jac. 99. Sandford *v.* Cutcliffe, Yelv. 124. Rabbetts *v.* Stoker, 2 Rol. Rep. 188. Snow *v.* Franklin, Lutw. 359. Rogers *v.* Payne, 2 Wils. 376, more fully stated in Selw. N. P. 519, 9th edit.

In order, however, to make a good defence by accord and satisfaction, the plea must state *full and adequate* satisfaction; therefore, in covenant for not repairing, a plea that the plaintiff agreed that the defendant should employ a person four days, in and about repairing the house, in satisfaction, and that he had employed the person, &c., is bad, for the defendant was obliged to do the repairs by the original covenant. (t)

The plea must also shew an agreement on record that is *certain and definite*: thus, to an action of covenant by the heir in reversion against the executor of tenant for life, for breach of covenant by the testator, in not repairing the house demised, it was pleaded, that the testator, tenant for life, died on such a day, and that afterwards it was agreed, between the plaintiff and defendant, that defendant should quietly depart and leave possession to the plaintiff; and, in consideration thereof, the plaintiff agreed to discharge him from the breach; and it was averred that within five days from the day of agreement he left the house. On demurrer the plea was holden to be bad; for the time was not fixed by the terms of the agreement when the executor should depart; and although it was averred that he departed within five days, yet that would not aid the first uncertainty; for the agreement was the foundation of the whole, which ought to be certain, when it should be performed. (u)

Lastly, the agreement, or accord, must be *executed*, (v) in satisfaction of the damages accruing for a covenant previously broken; for an accord and satisfaction before covenant broken is no answer to an action for a breach of covenant. (w)

5. Set off.

Where the tenant is charged with a breach of covenant, or

(t) *Adams v. Tapling*, 4 Mod. 88; 124.

and see *Fitch v. Sutton*, 5 East, 230; *Cumber v. Wane*, 1 Str. 426.

(u) *Sandford v. Cutcliffe*, Yelv.

(v) *Russel v. Russel*, 3 Lev. 189.

(w) *Covil v. Goffery*, 2 Rol. Rep.

96. *Kaye v. Waghorn*, 1 Taunt. 428.

in debt for non-payment of rent, he cannot shew that he has been put to expense by the landlord's breach of covenant, and so set off the one demand against the other, unless there be a particular covenant in his lease enabling him so to do. (*x*) It was, indeed, decided by two judges against one, in an early case, that where the lessor had bound himself to repair, and brought debt for rent against the lessee, the lessee might plead that he had expended the rent in repairs. (*y*) But this doctrine was doubted by Lord *Holt*, unless there were a covenant for the tenant to deduct; (*z*) and the point has been of late years settled upon the ground that the expenses to which the tenant may have been put by the landlord's breach of covenant must be unliquidated damages, and, consequently, not capable of being set off. (*a*)

Where the landlord directed his tenant, who was overseer of the poor, to pay on the landlord's account rates assessed upon him, under a promise that the levies should eat out the rent, the Court allowed the tenant to set off the rates so paid in an action for use and occupation, although the rates were irregularly assessed upon the landlord; he, however, having full knowledge of that fact. (*b*)

The subject matter of the tenant's defence being thus ascertained, it remains briefly to consider under what form of plea the several answers to the landlord's complaint may be given in evidence, having reference to the new statutory general rules for pleading; but it will be proper first to remark, that by the 3 & 4 Wm. IV. c. 42, s. 21, it is enacted, that it shall be lawful for the defendant, in all personal actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest and imprisonment, criminal

Under what
pleas these
matters may
be shewn.

(*x*) *Johnson v. Carre*, 1 Lev. 152.

(*y*) *Taylor v. Beal*, Cro. Eliz. 222. S. C. 1 Leon. 237.

(*z*) In *Clayton v. Kinaston, Ltd.* Raym. 420.

(*a*) *Weigall v. Waters*, 6 T. R.

488. *Howlet v. Strickland*, Cowp.

56. Selw. N. P. 575, 9th edit. *et vide supra*, 613, as to land-tax.

(*b*) *Roper v. Bunford*, 3 Taunt. 76.

prosecution, or debauching the plaintiff's daughter or servant,) by leave of any of the superior courts where such action is pending, or a judge of any of the superior courts, to pay into Court a sum of money by way of such compensation in such manner and under such regulations as to payment of costs and form of pleading as the judges, or eight or more shall by rule decree. By a general rule 4 Wm. IV., the form of such plea is prescribed.

I. In debt.

In the action of debt for rent.

1. *Nil habuit.*

When the defendant intends to shew that the plaintiff never had any interest in the premises, the proper plea is *nil habuit in tenementis*. Where the lease appears by the declaration to have been made by indenture, the defendant is at once estopped from pleading *nil habuit*; (c) and such plea will be bad on demurrer. (d) But if the plaintiff merely reply *habuit*, he waives the estoppel: and the matter being left at large, the jury may find the truth notwithstanding the indenture. (e) Where the plaintiff does not shew that the lease was by indenture, but merely declares *quod cum demississet*, the plaintiff loses the benefit of the estoppel, and the defendant may then plead *non habuit*, and leave the plaintiff to reply his title and estate, which he may now do in general terms, (f) though formerly it was necessary specially to set out his title, (g) and conclude *unde petit judicium* if the defendant should be admitted to plead the plea against his own acceptance of the indenture. (h)

(c) *Kemp v. Goodal*, 1 Salk. 277. S. C. *Ld. Raym.* 1154. 11 Mod. 507. *Heath v. Vermeden*, 3 Lev. 146. *Palmer v. Ekins*, *Ld. Raym.* 1551. *Evans v. Lady Falconbridge*, *Ca. temp. Hardw.* 872. *Wilkins v. Wingate*, 6 T. R. 62. *Wood v. Day*, 1 Moore, 389.

(d) *Kemp v. Goodal*, *supra*. *Sullivan v. Stradling*, 2 Wils. 208. *Alchorne v. Goome*, 2 Bing. 54; and see *Pope v. Biggs*, 9 B. &

C. 251.

(e) *Harris v. Parker*, 2 Vent. 253, 270. S. C. 4 Mod. 78.

(f) *Kemp v. Goodal*, *supra*. *Treviban v. Lawrence*, *Ld. Raym.* 1051. *Davenant v. Rafter*, *Ld. Raym.* 1054.

(g) *Vide Gyll v. Glass*, *Cro. Jac.* 312. S. C. *Yelv.* 227. 2 Bulstr. 41. *Aylet v. Williams*, 3 Lev. 193.

(h) *Trevilan v. Lawrence*, *id. sup.*

Where the lease appears by the declaration to have been by deed-poll, the defendant is not estopped from pleading *nil habuit*; a deed-poll being no estoppel, because it is not mutual. (i) And so where a demise by indenture has been made by a feme covert, or an infant. (k) Where the defendant means to admit that the plaintiff made the demise to him, but intends to rely upon the expiration of the plaintiff's estate, he cannot plead *nil habuit*, but must plead such matter specially. (l)

Where the defendant, without disputing the landlord's title, means to shew that the demise never was made, he may in case the declaration states the demise to have been by deed, plead *non est factum*; or if the demise be not stated to be by deed, *non demisit* is a proper plea to an action of debt for rent. (m) The plea of *non est factum* operates as a denial of the execution of the deed in point of fact only, and all other defences must be specially pleaded. (n)

2. *Non est factum.*3. *Non demisit.*

New general rule.

The statute of the 9 Geo. IV. c. 15, extended by the 3 & 4 Wm. 4, c. 42, enabling the Courts to rectify the pleadings for error not material to the merits of the cause has been already noticed.

Where the defendant admits the demise, but denies that any rent is in arrear, the usual plea was *nil debet*, or *nil detinet*. But now the plea of *nil debet* is not allowed in any action, (o) the defendant must deny specifically some particular matter of fact alleged in the declaration or plead specifically in confession and avoidance. (p)

5. *Nil debet.*

New general rule.

(i) Co. Lit. 47. b. Harris v. B. & Ad. App. 10 Bing. 470. 2 Parker, 2 Ventr. 251. Lewis v. Crompt. & Mees. 22. Willis, 1 Wils. 314.

(k) Vide Parker v. Manning, supra. And see as to estoppels in general, vide p. 18. n. (o) General Rule, 4 Wm. 4. 5 B. & Ad. App. 10 Bing. 470. 2 Crompt. & Mees. 22. Selw. N. P. 610, 9th edit. Tidd's New Rules, 360.

(l) Treport's case, 6 Rep. 15. b.

(m) Vide s. 23, and Selw. N. P. 610, 9th edit. (p) Anon. 1 Ventr. 258. Browne's case, 1 Mod. 118. (Contra, Wingfield v. Seckford, 2 Leon. 10.)

(n) General Rule, 4 W. & M. 5

If the rent has been in part secured by the promissory note of the tenant and a stranger, and the landlord at a subsequent period agrees not to call for any rent then due, it seems that his claim on the promissory note will be extinguished. (r)

6. *Solvit ad diem, or post diem.*

If the defendant mean to show payment, he may plead *solvit ad diem*, or *solvit post diem*. Or if the landlord has distrained, and so satisfied the rent, the tenant may plead *levie per distress*. But it should appear by this plea that the rent has been *satisfied* by the distress; because the distress will not necessarily be a satisfaction, being at common law a mere pledge. (s)

7. *Levie per distress.*

New general rule.

By the general rule, 4 Wm. IV. pleas founded on one and the same principal matter, but varied in statement, description, or circumstances only, are not to be allowed, as for example, pleas of *solvit ad diem* and *solvit post diem* are both pleas of payment varied in the circumstances of time only, and both are not to be allowed. But pleas of payment and of accord and satisfaction, or of release are distinct, and are to be allowed. (t)

In pleading payments under the land-tax act, it must be shewn for what specific periods the several payments have been made: because (as we have before seen) the tax for one year can be deducted only from that particular year's rent. (u)

8. Tender.

A *tender* must be specially pleaded in debt for rent, in which plea the defendant should shew that at the last hour before sun-set (u) he was ready to pay the rent upon the land, (v) and that no person was there to receive it. If, how-

Draper v. Glassop, Ld. Raym. 153.

Anon. 1 Salk. 278. Gallaway v.

Susach, 1 Salk. 284. S. C. Holt.

299. 1 Wms. Saund. 204. n. (2.)

(r) Howell v. Lewis and another, 7 C. & P. 567.

(s) Lear v. Edmonds, 1 B. & A.

157. Lingham v. Warren, 2 B. &

B. 36. Hudd v. Ravenor, 2 B. &

B. 662.

(t) Selw. N. P. 569, 9th edit.

(tt) Stubbs v. Parsons, 3 B. & A.

516, et vide supra.

(u) Furser v. Prowd, Cro. Jac.

23. Thomson v. Field, *ibid.* 499. 4

(v) *Ibid.* Crouche v. Fastolfe, Sir

T. Raym. 418.

ever, he has omitted to tender it at the last hour, he may plead that he afterwards tendered it to the plaintiff, and that the plaintiff refused it. (*w*) But in either case he must make *profert* of the money into court, stating that he has always been, and still is, ready to pay it. (*x*)

In assumpsit, the defendant never can plead *nil habuit in tenementis*: but prior to the new rules, any special matter of defence, arising from the want or expiration of title, might have been given in evidence under the general issue, (*y*) as infancy, (*z*) payment, (*a*) a release, (*b*) accord and satisfaction. (*c*) But by the new rules, the plea of non-assumpsit, except on bills of exchange and promissory notes, will operate only as a denial in fact of the express contract or premises alleged, or of the matters of fact from which the contract or premises alleged may be implied by law. (*d*) Other matters of defence must be pleaded specially.

II. In assumpsit for use and occupation.

New general rule.

In covenant, there is regularly no general issue, *non infregit conventionem* being only pleadable in certain cases, according as the breach is stated affirmatively or negatively. It seems, that where a breach is alleged in the affirmative, and the declaration concludes "and so the defendant hath broken his covenant," such a plea will be good; because this directly puts in issue the subject matter of the action, *viz.* the breach of the covenant; (*e*) but where the declaration alleges some breaches in the affirmative, and some in the negative; or where the breaches being all in the affirmative, the declaration concludes, "and so the defendant *hath not kept* his covenant; the plea *non infregit* will be bad, because two negatives cannot make an issue. (*f*) This plea admits

III. In covenant.
1. *Non infregit conventionem.*

(*w*) Keating *v.* Irish, Lutw. 593.

Raym. 787.

(*x*) Brownlow *v.* Hewley, Lord Raym. 82. S. C. Lutw. 364, 368.

(*b*) Hawley *v.* Peacock, 2 Camp. 558.

See further as to *Tender*, 1 Wms Saund. 33. n. (2.)

(*c*) Paramour *v.* Johnson, 12 Mod. 376. S. C. Ld. Raym. 566.

(*y*) Lewis *v.* Willis, 1 Wils. 314.

(*d*) Chitt. Plead. Vol. III. p. 733,

(*z*) Darby *v.* Boucher, 1 Salk. 279.

6th edit.

Season *v.* Gilbert, 2 Lev. 144.

(*e*) Aster *v.* Mazeen, 2 Mod. 311.

(*a*) *Vide* Vanhatton *v.* Morse, Ld.

(*f*) Walsingham *v.* Combe, 1 Lev.

the deed of demise and merely puts the breach of covenant in issue. (*g*)

2. *Non est factum.*

New general rule.

Nil habuit in tenementis is a bad plea in covenant where the defendant is charged upon his indenture. But he may deny the execution of the deed, and put it in issue by plea of *non est factum*. The plea operates only as a denial of the execution of the deed in point of fact, all other defences must be specially pleaded. (*h*)

3. Eviction.

In covenant, eviction must be specially pleaded. (*i*) We have before seen that in order to cause a suspension of the rent, it must be an actual eviction, and not a mere trespass, and that the person evicting must have title to the land. (*k*) It is, therefore, necessary that both these facts should appear by the plea ;—and it is not sufficient merely to state, that the party ousting the defendant had title, but the nature of his title should be set out. (*l*) And if the plea be that the land has been taken under an *elegit* or extent, it must shew that the regular proceedings have been had for taking or extending the land. (*m*) Where the plaintiff declared upon a demise of the parsonage of D. and the defendant's covenant to pay rent thereon, and the defendant pleaded that before the rent became due the bishop sequestered the land for non-payment of the first-fruits, the Court held the plea bad, because it alleged no default in the lessor. (*n*)

4. Performance.

Where the covenants are in the affirmative, the defendant may plead a general plea of performance ; but if any of them

183. Pitt v. Russel, 3 Lev. 19.
Boone v. Eyre, 2 Bl. Rep. 1312.
Hodgson v. East India Company,
8 T. R. 278. Taylor v. Needham,
2 Taunt. 278, *et vide* Selw. N. P.
530, 9th edit.

(*g*) Gilbert v. Martin, 1 Lev. 114.

(*h*) *Vide supra*, 619.

(*i*) 1 Wms. Saund. 204. n. (2.)

(*k*) See Pope v. Biggs, 9 B. & C.
256. *Vide supra*, p. 608, 609, Selw.
N. P. 520, 9th edit.

(*l*) Jordan v. Twells, Ca. temp.
Hard. 172.

(*m*) Vouchell v. Dancastell, Moore,
891.

(*n*) Jeakill v. Linne, Hetl. 54.
S. C. Dallison, 44.

be in the negative, or in the disjunctive, he must specially shew which of them he has performed. (*q*)

The performance must be pleaded in the terms of the covenant; for where the breach was for not repairing, and the defendant pleaded that he had pulled down and rebuilt the premises, this was held bad on demurrer. (*r*)

In covenant for non-payment of rent, the defendant may plead *solvit ad diem*; but *solvit post diem*, or *levie per distress*, are no pleas in covenant for the reason already given. (*s*)

To an action for breach of covenant for non-payment of rent, the defendant, as has been already seen, may plead a release, or accord and satisfaction, in the same manner as to an action for debt. (*t*)

If the defendant mean to rely upon a set-off in covenant, he must *plead* it, and cannot give a notice with a plea of *non est factum*; for although a different doctrine once appears to have prevailed; (*u*) it is now settled that there is not any general issue in covenant, and, consequently, that the statute 2 Geo. II. c. 22, does not apply to this form of action. (*v*) Unliquidated damages, arising from the breach of other covenants to be performed by the plaintiffs, cannot be pleaded by way of set off, (*w*) neither can a sum certain be set off against the plaintiff's unliquidated demand. (*x*)

(*q*) Co. Lit. 303. *b*. Mints *v*. Bethill, Cro. Eliz. 749. Cropwell *v*. Peachy, *ibid*. 691. Norton *v*. Syms, Moore, 856. Fines *v*. Dell, Style, 163. Laughwell *v*. Palmer, 1 Sid. 87. Cutler *v*. Southern, 1 Saund. 116. Lord Arlington *v*. Merricke, 2 Saund. 410.

(*r*) Wood *v*. Avery, 2 Leon. 189.

(*s*) *Supra*, 612.

(*t*) *Supra*, 615; and see Brad-dick *v*. Thompson, 8 East, 344.

Thompson *v*. Brown, 7 Taunt. 656. Sellers *v*. Bickford, 8 Taunt. 31. Chitt. Plead. 909, Vol. III., 6th edit.

(*u*) Gower *v*. Hunt, Bull. N. P. 181. Barnes, 291, S. C.

(*v*) Oldenshaw *v*. Thomson, 5 M. & S. 164.

(*w*) Howlett *v*. Strickland, Cowp. 56. Weigall *v*. Waters, 6 T. R. 488.

(*x*) Cooper *v*. Robinson, 2 Chitt. Rep. 161.

IV. In waste.

IV. The writ of waste is abolished by the 3 & 4 Wm. IV. c. 27. To an action on the case in the nature of waste, the defendant may plead not guilty: whereby he puts the whole declaration in issue, and compels the plaintiff to prove his title as laid in the declaration, and also the kind of waste stated in it. (a)

New general rule.

By the late rules of pleading, it is declared that in actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement. And no other defence than such denial shall be admissible under that plea, and all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration, and all matter of confession and evidence shall be pleaded specially as in actions of assumpsit. (b)

(a) *Leigh v. Leigh*, Lutw. 1547. Bing. 471. 2 Crompt. & Mess. 23,

(b) See 5 B. & Ad. App. 10 and see Tidd's New Prac. 365.

CHAPTER THE SECOND.

Of the Tenant's Remedies against his Landlord.

SECTION I.

FOR BREACH OF COVENANT OR AGREEMENT.

WHERE the landlord is guilty of a breach of his covenant with his tenant, an action of covenant is the proper remedy. The nature of this action has been already discussed; and it here only remains to point out, in addition, the particular manner in which the tenant should assign a breach of the covenant for quiet enjoyment either express or implied. By the 3 & 4 Wm. IV. c. 42, actions of covenant must be brought within ten years after the end of the then present session, or within twenty years next after the cause of such action. (a)

By action of
covenant.

In assigning a breach *by the entry of the lessor himself*, it is sufficient to say, that he entered and ousted the plaintiff, without shewing under what pretence or title the entry was made: (b) and so where the covenant is against the entry of any particular person, a general averment that such person entered, without shewing whether by right or wrong, is sufficient. (c)

(a) *Vide supra*, 424.

(b) *Corus v. ———*, Cro. Eliz. 544. *Bradshaw's case*, 9 Rep. 60. *b. Penning v. Lady Plat*, Cro. Jac. 383.

(c) *Foster v. Mapes*, Cro. Eliz.

212. *Muscot v. Ballet*, Cro. Jac.

369. *Forte v. Vines*, 2 Rol. Rep.

21. *Perry v. Edwards*, Str. 400.

Lloyd v. Tomkies, 1 T. R. 671.

But where the lessee has been evicted by a stranger, it is absolutely necessary to shew that the stranger entered, not by wrong, or by a title derived from the lessee himself, (*d*) but by force of a legal and an elder title. (*e*) Greater particularity was formerly required in setting out this title than at present; for upon a covenant that the lessee should enjoy against F. E. and all others claiming under him, the plaintiff alleged as a breach, that he was ousted by J. S. claiming title under the said F. E.; the Court of Queen's Bench having overruled an objection that it was not shewn how J. S. claimed his title, or by what conveyance, and judgment being thereupon given for the plaintiff, that judgment was afterwards reversed by the opinion of all the justices and barons of the Exchequer Chamber. (*f*) But modern decisions have done away with the necessity of such particular statements.

In an action on a covenant in a lease for quiet enjoyment, the breach assigned was, that *at the time of the demise* to the plaintiff, one J. B. Pierson had lawful right and title to the premises, and *having such lawful right and title, entered and ejected* plaintiff. On special demurrer to the declaration, it was objected, that the plaintiff, in alleging the eviction, ought to have shewn the title of J. B. Pierson; or at least it should have been averred that J. B. Pierson had such a title as was inconsistent with the plaintiff's title to possess the premises; and, though it was alleged that J. B. P. had lawful right and title to the premises, he might only have had a title to recover in a real action, and not a right of entry; and that the mis-

(*d*) Kirby v. Hansaker, Cro. Jac. 315. Wotton v. Hele, 2 Saund. 177.

(*e*) Chantflower v. Priestley, Cro. Eliz. 914. S. C. Yelv. 30. Norman v. Foster, 1 Mod. 101. S. C. 3 Keb. 246. Rashleigh v. Williams, 2 Ventr. 62. And see Skinner v. Kelbys, 1 Show. 70. Buckley v. Williams, 3 Lev. 325. Jordan v.

Twells, Ca. temp. Hardw. 172.

(*f*) White v. Ewer, Cro. Eliz. 823. S. P. Kirby v. Hansaker, Cro. Jac. 315. Mosse v. Archer, 3 Mod. 135. Wotton v. Hele, 2 Saund. 177. S. C. 1 Mod. 66. 1 Lev. 301. But see Proctor v. Newton, 2 Lev. 37.

chief to be apprehended from this loose mode of pleading was, that it might give a cover to an eviction by collusion. The Court overruled the objections, and gave judgment for the plaintiff; Lord *Kenyon*, C. J., observing, that if the declaration were certain to a common intent, it was sufficient; that it would be doing violence to the words to say, that the lawful right and title which it was stated J. B. P. had, did not legalize his entry; that the fair import of the words was, that he had lawful right and title to do that which he did. *Buller*, J., said, that when it was stated, "that the party having a lawful right and title entered," it was the same as saying, "he entered by lawful right and title." (g) In the preceding case, the objection "that the title of the party evicting was not *particularly* set forth," was not pressed upon the Court: in a subsequent case, however, this objection recurred, and the attention of the Court was directed to it; but it was overruled, notwithstanding the decision in error in the Exchequer Chamber, in *White v. Ewer*. (h) And Lord *Kenyon*, C. J., in delivering the opinion of the Court said, that to compel the plaintiff to set forth the particulars of the title of the person who entered on him, would impose insuperable difficulties on him; for the knowledge of those particulars could not be acquired, except by an inspection of title deeds, to which the plaintiff could not have access. (i)

Where J. S. had leased lands to A. for years, and A. assigned part of them over to B. with a covenant for quiet enjoyment, and B. afterwards assigned them over to C., and C. having been evicted by J. S. for a breach of covenant committed by A. previously to the assignment, an action was brought by C. for the ouster by J. S., but the declaration contained no averment of the title of J. S., the Court held, that inasmuch as the declaration set out the indenture from A. to B., wherein it was recited that J. S. by indenture demised the premises to A., they would presume after verdict

(g) *Poster v. Pierson*, 4 T. R. 617.(i) *Hodgson v. East India Com-*(h) *Cro. Eliz.* 823. Cited *supra*. *pany*, 8 T. R. 278.

that J. S. had title to the premises, although there was no express averment to that effect. (*k*)

Where the lessor covenanted against the entry of all persons claiming by the assent, means, or procurement of M., and the breach assigned was, that C. *claiming title* from M. entered, &c. the breach was held ill. (*l*)

In assigning a breach upon a covenant that the lessor was seised of an indefeasible estate in fee-simple, it is sufficient to say that he was *not seised of an indefeasible estate in fee-simple*, without shewing of what estate he was seised. (*m*) And where the covenant was that he should make a good title to the lands to the satisfaction of the plaintiff or his counsel, it was held sufficient to pursue the words of the indenture in assigning the breach, and to state that defendant did not make a good title to the satisfaction of the plaintiff or his counsel. And to an objection to this breach that, being in the disjunctive, the plaintiff ought to have shewn that such a one was his counsel, of which the defendant had notice; it was answered that this matter ought to have come from the other side, and that *prima facie* the breach was well assigned. (*n*)

The word "demise" implies a covenant for title as well as a covenant for quiet enjoyment, (*o*) and it seems that under the word "demise" the lessee may maintain an action of covenant against the lessor for not having sufficient power to demise for the whole term, whereby the lessee has been put to expense in procuring a perfect title; (*p*) but in assigning, as a breach of such an implied covenant, an eviction of

(*k*) *Campbell v. Lewis*, 3 B. & A. 393.

(*l*) *Ecles v. Lambert*, Aleyn, 41. And see *Howes v. Brushfield*, 3 East, 491. And *Wotton v. Keel*, 2 Wms. Saund. 181. n. (10.)

(*m*) *Glinister v. Audley*, Sir T. Raym. 14. S. C. 1 Keb. 58.

(*n*) *Rawlins v. Vincent*, Carth. 124.

(*o*) *Lane v. Stephenson and another*, executors of *Gutteridge*, 5 Bing. 183, N. S. *et vide supra*, 215.

(*p*) *Holder v. Taylor*, Hob. 12. *Fraser v. Skey*, 2 Chit. Rep. 646.

the plaintiff's assignee, it is not enough to state that a third person was seised in fee of the premises, and that the assignee was evicted, but the declaration must shew distinctly by whom he was evicted. (*p*)

Where the landlord has been guilty of a breach of an express parol agreement, or of an implied undertaking, the tenant may maintain an action of *assumpsit*. (*q*)

By action of
assumpsit.

That the tenant is bound to deduct every years' land-tax from every years' rent has been already shewn. (*qq*) If he pay his rent, and neglect to make this deduction, he cannot recover it back from the landlord in an action for money paid to his use; (*r*) unless in a case of distress, where the tenant has been obliged to pay the whole rent in order to redeem his goods. (*s*) In a case where the landlord in 1814 distrained, refusing to deduct the land-tax, and the tenant protested against his liability to pay the tax, but continued, notwithstanding his protest, to pay his rent without deduction during five succeeding years, the Court of Common Pleas held that he could not recover, in an action for money paid to the landlord's use, any of the sums so paid for the land-tax. (*t*)

Deductions for
land-tax.

Where the goods of an under-tenant, or lodger, or stranger, are distrained, and he whose goods are taken, in order to redeem them, pays the rent to the original landlord, he may maintain an action *for money paid* against him from whom the rent was due. (*u*) But an under-tenant, whose goods have been actually sold under a distress by the original landlord, for rent due from his immediate tenant, cannot

Rent paid to
superior land-
lord.

(*p*) *Ibid.*

(*q*) *Vide infra*, p. 636.

(*qq*) *Supra*, 276.

(*r*) See, however, *Dawson v. Linton*, *supra*, 277.

(*s*) *Vide Graham v. Tate*, 1 M. & S. 609. Nor can he recover such

payments by bill in equity. *East v. Thornbury*, 3 P. Wms. 128, and note [B.] *Vide infra*, p. 662.

(*t*) *Spragg v. Hammond*, 2 B. & B. 59.

(*u*) *Exall v. Partridge*, 8 T. R. 308.

maintain an action *for money paid* to the use of the latter; because the *money* never was the under-tenant's;—for on the sale under the distress the money paid by the purchaser immediately vested in the original landlord. (v)

Specific performance of agreement to lease refused.

If a party in possession under an agreement for a lease commits felony, (w) or does acts which would have amounted to a forfeiture or breach of covenant, in case a lease had been actually granted, or commits waste, a Court of Equity will not in general decree a specific performance, or grant an injunction against an ejectment. (x) But if the tenant assigns the benefit of his contract to a third solvent party, and afterwards becomes bankrupt or insolvent, the Court will, on bill filed by the assign, decree specific performance against the landlord. (y) This doctrine, however, will not apply in case the agreement stipulates that the lease shall contain a proviso not to assign, and the benefit of the contract has been transferred without the lessor's license. (z)

Whether the agreement can be enforced by the bankrupt and his assignees is a different question. (a) Solvency or insolvency is an objection of much weight, and the decree of the Court may depend on various circumstances. (b)

Specific performance upon covenant to renew.

It is no objection to the execution of a covenant, that it is a covenant for perpetual renewal. (c) Lord *Thurlow*, indeed, on more than one occasion, expressed his disapprobation of such covenants, and inclined to consider them contracts of such a

(v) *Moore v. Pyrke*, 11 East, 52.

(w) See *Willingham v. Joyce*, 3 Ves. 169.

(x) *Boardman v. Mostyn*, 6 Ves. 472. *Gourlay v. Duke of Somerset*, 1 Ves. & Bea. 68. *Lovat v. Lord Ranelagh*, 3 Ves. & Bea. 29.

(y) *Crosbie v. Tooke*, 1 Myl. & Keen, 431. 1 Mont. & Ayr. 214. *Morgan v. Rhodes*, *ibid.* 435. 1 Mont. & Ayr. 214, overruling the

decision of the Vice Chancellor, *et vide Brooke v. Hewitt*, 3 Ves. 253. *Powell v. Lloyd*, 1 Y. & J. 427. 2 Y. & J. 372, *ex parte Sutton*, 2 Rose, *et vide* 3 Ves. 256.

(z) *Weatherall v. Geering*, 12 Ves. 504.

(a) *Brooke v. Hewitt*, 3 Ves. 253.

(b) *Buckland v. Hall*, 8 Ves. 92.

(c) *Supra*, p. 228.

nature as a Court of Equity ought not to execute. (d) But the contrary is now clearly settled; and a Court of Equity will in all cases execute an express covenant for perpetual renewal, where such a covenant is clear and unequivocal. (e) But if the covenant is mixed up with a covenant for further assurance, it may be treated as intending the latter, and not a perpetual renewal. (f)

A. holding under a corporation (of which he was a member, and from which he was in the habit of obtaining renewals upon favourable terms,) demised to B. at a certain rent with a covenant to renew to him *at the same rent*, as often as the corporation should renew to the covenantor. The corporation discovering that from the favour they had shewn to A. they had been guilty of a breach of trust, resolved to renew the lease, not by private contract with A. but to the highest bidder by public auction. A. being the highest bidder became tenant of the premises; and then refused to renew to B. at the same rent as before. But Lord Chancellor *Redesdale* held, that he was bound to renew upon the old terms; unless he chose to abandon the property, and allow the plaintiff to stand in his place for the renewal which he had obtained; which, as he had not covenanted to renew with the corporation, he might perhaps be at liberty to do: but that if he thought fit to retain the benefit of the renewal,

(d) *Rees v. Ld. Dacre*, cited 9 Ves. 332. *Tritton v. Foote*, 2 Br. Ch. Ca. 636. And see *Hyde v. Skinner*, 2 P.Wms. 196. *Somerville v. Chapman*, 1 Br. Ch. Ca. 61, and *Russel v. Darwin*, 2 Br. Ch. Ca. 639. n.

(e) *Iggulden v. May*, 9 Ves. 325. S. C. 7 East, 237. 2 N. R. 449. And see *Bridges v. Hitchcock*, 5 Br. P. C. 6, and *Furnival v. Crewe*, 3 Atk. 83. *Betsworth v. Dean, &c. of St. Pauls'*, 2 Eq. Ch. Abr. 26.

Vide Baynham v. Guy's Hospital, 3 Ves. 295. *Moore v. Foley*, 6 Ves. 232. *Iggulden v. May*, *ub. sup.* *City of London v. Mitford*, 14 Ves. 41. *Watson v. Master, &c., of Hemsworth Hospital*, *ibid.* 324. *Willan v. Willan*, 16 Ves. 84, and see *Redshaw v. Bedford Level Company*, 1 Eden, 346, and the editor's note.

(f) *Brown v. Tyte*, 8 Bli. 272. N. S. 2 Cl. & Fin. 396, *et vide supra*, 230.

he was bound specifically to execute his covenant on the terms upon which he had covenanted to renew. (*h*)

Where the lessor covenanted to renew the lease at the request of the lessee within the term, and the lessee dying made no such request, but his executors did within the term, Lord Chancellor *Macclesfield* held, that the lessor was bound to renew. (*i*)

Purchaser.

A purchaser will be bound by a covenant to renew. Where, therefore, A. demised lands to B. for three years, and, in consideration of B.'s undertaking to lay out money in improvements, A. covenanted to renew at the same rent, and afterwards C. purchased the estate, the Court decreed that the purchaser should make good this covenant. (*k*) And where a purchaser from tenant in tail had notice of an agreement by him to renew a lease, which the father, tenant for life, had covenanted to renew, the Court held that he was bound to renew the lease. (*l*)

Charities.

In the case of leases by charitable foundations, with covenants for renewal, a Court of Equity will not suffer them to bind the estate for a longer period than they were originally enabled to lease it for. Where, therefore, by the rules established on the foundation of an hospital, no lease was to be made for more than twenty-one years, and the hospital made a lease for twenty-one years, with a covenant by renewal to make it up sixty years, the Court held this not binding in Equity, because it was no less prejudicial than a lease for sixty years. (*m*) And where a college, restrained by its constitution from making leases, except for twenty-one years, and at a rack-rent, made a lease for twenty-one years, at less than a rack-rent; and by an entry in the college re-

(*h*) *Evans v. Walsh*, 2 Sch. & Vern. 447.
Lef. 519.

(*i*) *Hyde v. Skinner*, 2 P. Wms. 196.
Ves. 498.

(*k*) *Richardson v. Sydenham*, 2 410.
(*l*) *Earl Brook v. Bulkeley*, 3
(*m*) *Lydiatt v. Foach*, 2 Vern.

gister recommended their successors to renew the lease at the same rent ; and then afterwards, when the lease was near expiring, made an order that the lessee should have a new lease at the old rent, Lord Chancellor *Parker*, upon a bill brought by the administratrix of the lessee against the college for a renewal, reprobated the conduct of the fellows who had made this recommendation, and dismissed the bill with costs. (n)

But a different rule of Equity will be found to prevail in respect of leases of land in Ireland, where husbandry leases for lives with benefit of renewal at a premium are common. In the case of *Attorney-General for Ireland v. Hungerford*, in the House of Lords, on appeal from a decision of the Lord Chancellor of Ireland, it appeared, that in the year 1710 charity lands were leased by trustees at a fair rent of 100*l.* for three lives on a premium of 300*l.*, with a covenant for perpetual renewal on a dropping of a life on payment of a fine of 25*l.* for each renewal. An information was filed for setting aside the lease as fraudulent and void, and in violation of the trust reposed in the trustees. The Lord Chancellor, after adverting to the fact, that at the time of granting the lease it was considered a great object to get Protestant tenants, who would bind themselves and their descendants to the payment of adequate rents ; and adverting to the lapse of time since the granting the lease, which he treated as evidence, that the rent was a fair value, and that the trustees exercised a sound discretion in demising for three lives with a covenant for perpetual renewal in consideration of a fine, dismissed the information, but without costs. The House of Lords, after argument on appeal, affirmed the judgment of the Lord Chancellor. (o)

Renewal of
Irish leases.

Where the tenant is insolvent, it should seem that a Court No renewal in

(n) *Taylor v. Dulwich Hospital*,
1 P. Wms. 655.

(o) *Attorney-General v. Hungerford*, 8 Bligh. N. S. 437.

case of insolvency.

Bankruptcy.

Felony.

Fraud.

Laches.

of Equity will not decree a renewal. In a case where an injunction had been granted against an ejectment by the landlord, upon the ground that there had been a covenant to renew, the Lord Chancellor dissolved the injunction, upon its appearing, that the tenant had paid a composition of seven shillings in the pound to his creditors, and among them to the landlord for a debt due for goods sold. (*p*) It seems clear that where the lessee has become bankrupt, his assignees cannot derive any benefit from a covenant for renewal entered into before the bankruptcy: (*q*) and the Court will not enforce a covenant for renewal where the tenant has been convicted of felony; (*r*) nor in cases where the agreement to renew has been accompanied by fraud or misrepresentation; (*s*) or when the tenant has already been guilty of wilful breaches of covenants agreed to be inserted in the new lease. (*t*)

In general, where there has been laches or neglect upon the part of the tenant in not applying for a renewal in due time, a Court of Equity will not assist him, unless he satisfactorily accounts for the delay; (*u*) as when a lessor covenanted to renew on request within three months of the expiration of the lease, and the request was not made until within one month; (*w*) and as where the lessee for lives, with a covenant to renew on the expiration of one life, omits to

(*p*) *Buckland v. Hall*, 8 Ves. 92. *Vide Brook v. Hewett*, 3 Ves. 253. *Boardman v. Mostyn*, 6 Ves. 467. *De Minckwitz v. Udney*, 16 Ves. 466, *et vide Hyde v. Skinner*, 2 P. Wms. 197.

(*q*) *Drake v. Mayor of Exon*, 1 Ch. Ca. 71. *Vandenanker v. Desbrough*, 2 Vern. 97. *Moyses v. Little*, *ibid.* 194. And see *Weatherall v. Geering*, 12 Ves. 504, and *Skerne's case*, Moore, 27.

(*r*) *Willingham v. Joyce*, 3 Ves. 168.

(*s*) *Ibid.* *Pendred v. Griffith*, 1

Br. P. C. 314. *Davis v. Oliver*, 1 Ridgw. P. C. 9.

(*t*) *Hill v. Barclay*, 18 Ves. 63. But see *Williams v. Cheney*, 3 Ves. 59, and *Weatherall v. Geering*, 12 Ves. 511. *Gourlay v. Duke of Somerset*, 1 Ves. & Bea. 68.

(*u*) *Allen v. Hilton*, 1 Fonbl. on Equity, 432. *Baynham v. Guy's Hospital*, 3 Ves. 295. *Eaton v. Lyon*, *ibid.* 690. *City of London v. Mitford*, 14 Ves. 41. And see *Earl of Ross v. Worsop*, 1 Br. P. C. 281.

(*w*) *Allen v. Hilton*, *supra*.

apply for a renewal until two drop. (v) And where the Court interferes in favour of the tenant, it will take care that the lessor is put in the same situation as that in which he would have been, if the tenant had applied in due time. Where, therefore, the tenant held under a lease for twenty-one years at 1*l.* rent, with a covenant to renew from twenty-one years to twenty-one years to make up ninety-nine years, and at the expiration of the first term there was an arrear of rent, and no application was made to renew, upon which the lessor brought an ejectment, and obtained possession, the Court relieved the tenant upon a bill for a renewal, (in which he accounted for his delay,) upon payment of the arrear of rent and interest, with costs. (w)

In order to give a tenant a right to demand a renewal in a Court of Equity, some covenant, or at least some understanding between the parties to that effect, must have existed. The mere fact of the tenant's having expended money in improving the estate can give him no equity. It might be otherwise, if the landlord were to enter into an arrangement with the tenant relative to improvements, and encourage him to proceed: equity might then consider such arrangement as an implied agreement that the tenant should have the benefit of his expenditure, and interfere to prevent the landlord from putting an end to the tenancy. (x)

Nor unless
covenant or
agreement.

A promise by the landlord to renew a lease in consequence

(v) *Bayly v. Corporation of Leominster*, 1 Ves. jun. 476.

(w) *Rawstorne v. Bentley*, 4 Br. Ch. Ca. 415, *et vide* *Statham v. Liverpool Dock Trustees*, 3 Y. & Jer. 565. *Lord Doneraile v. Chartres*, 1 Ridgw. 122, and *O'Neil v. Jones*, *ibid.* 174. *Kane v. Hamilton*, *ibid.* 180. *Bateman v. Murray*, *ibid.* 187. S. C. 5 Br. P. C. 20. *Boyle v. Lysaght*, 1 Ridgw. 384. S. C. Vern. & Scriv. 135.

Magrath v. Lord Muskerry, 1 Ridgw. 460. S. C. Vern. & Scriv. 166; which cases gave rise to the Irish Tenantry Act 19 & 20 Geo. III. c. 30, which see, and the construction put upon it in *Jackson v. Saunders*, 1 Sch. & Lefr. 443. *Keating v. Sparrow*, 1 Ba. & Be. 367.

(x) *Pilling v. Armitage*, 12 Ves. 78.

of money already laid out by the tenant, was held by Lord Chancellor *Thurlow* to be *nudum pactum*, and not to be specifically performed in equity; and his lordship further held, that although the tenant had subsequently laid out money, yet, as it was not done under any agreement to renew, it could not alter the case, though had the tenant stated his intention, and the promise to renew been founded upon that, he would have been entitled to a specific performance. (y)

Assumpsit for
breach of
agreement.

If a landlord enters into an agreement with a party to let certain premises to him, and afterwards refuses to let him into possession, the party may maintain an action of assumpsit against him; and though the agreement for such a letting is delivered over after signature to the party interested, with an express verbal stipulation that it is still to be subject to the landlord's being satisfied with the reference given him by the tenant, it seems it may be a proper question for the jury to say, on an action for not performing the agreement, whether, inquiry having been made, the answer given by the party referred to, was such as reasonably satisfied the condition, the landlord having declared that it was not satisfactory to *him*, and having upon that ground refused to let the tenant into possession. (z)

A plaintiff in such an action may give evidence of any particular loss sustained by the breach of such an agreement, if he has stated loss generally in his declaration. (a)

Sub-lessee.

In a recent case, a question arose whether a sub-lessee was bound to contribute to the payment of fines on renewals of a lease, which took place after his lessor had obtained a lease, which was more than sufficient to cover the entire term agreed to be granted him, and the Vice-Chancellor decided,

(y) *Robertson v. St. John*, 2 Br. Ch. Ca. 140. And see *Richardson v. Sydenham*, 2 Vern. 447, et vide *Pilling v. Armitage*, *supra*.

(s) *Ward v. Smith*, 11 Price, 19. *Coe v. Clay*, 3 Moore & Payne, 57. 5 Bing. 440.
(a) *Ibid*.

that under the circumstances of that case, he was not so liable. (c)

Those who have a special interest in the old lease will, in general, take a like interest in the renewed lease, and, therefore, where a testator having purchased a renewable lease of tithes devised them, separated from the farm, with a condition that the farm should at all time be exempt from tithes, it was held that on a renewal of the lease the lands remained free from tithes, and that the owner of the lease, or purchasers from him, could not call on the owner of the land to contribute to the renewal fines. (d)

Interest in renewed lease.

Guardians, committees of lunatics, married women, and infants, are entitled by statute to apply in a summary way to the Court of Chancery for the surrender and renewal of leases. (e)

Guardians, &c.

So long as the tenancy continues beneficial to the landlord, the tenant may reasonably expect that the landlord will make no objection to the renewal of his lease upon its expiration although it contain no express covenant to that effect. This bare expectation has been sometimes called "*The tenant-right of renewal.*" But the term *right* is improperly applied; especially when the refusal of the Courts to *imply* a covenant for perpetual renewal is considered. It is true, indeed, that in *Ireland*, and in some parts of the north of *England*, the right to a renewal is claimed as being incident to particular districts, and is enforceable upon what has been called *local equity*. But in all other cases this supposed tenant-right is a matter of mere indulgence, which the lessor may grant or withhold without being at all subject to the interference of the Courts. The tenant-right is rather a matter of equity than of law. It amounts to this,—that if a third party interferes between the landlord and tenant, and

Tenant-right of renewal.

(c) *Clutton v. Fleming*, 8 Sim. 247.

105. (e) 11 Geo. IV. and 1 Wm. IV.

(d) *Webb v. Lugar*, 2 Younge, c. 65, s. 12 to 16.

covertly or by false representation obtains a new lease, to the detriment of the tenant, a Court of Equity will so far recognize his tenant-right, as to convert the new lessee into a trustee for him, and compel the former to execute an assignment to the old tenant. (*f*)

In case the landlord refuses to grant a lease according to his agreement, the tenant may file his bill in equity against him for a specific performance, which, on proof of the agreement, will be decreed, unless, as before remarked, the lessee has, by his own conduct, deprived himself of the aid of the Court. (*g*)

SECTION II.

OF THE TENANT'S REMEDIES FOR AN ILLEGAL OR IRREGULAR DISTRESS.

By rescue.

When the landlord unlawfully seizes the goods of his tenant as a distress, the tenant may forthwith rescue them before they are impounded. He may, therefore, rescue them before the impounding if the landlord distrain, when there is no rent in arrear; (*h*) or though the rent be due at the time of the seizure, if before the impounding, the tenant tender the rent. (*i*) And so if the landlord take goods which are privileged by law; as things protected for the sake of trade, or beasts of the plough, while other things remain upon the premises sufficient to satisfy the distress. (*k*)

(*f*) *Vide* *Lee v. Vernon*, 5 Bro. P. C. 10. *Watson v. Master, &c. of Hemsworth Hospital*, 14 Ves. 324.

(*g*) *Vide* *Williams v. Cheney*, 3 Ves. 59. *Robson v. Collins*, 7 Ves. 130. *Browne v. Warner*, 14 Ves. 156, 409. *Clarke v. Grant*, *ibid.* 519. *Willan v. Willan*, 16 Ves. 72. *Western v. Perrin*, 3 Ves. & Bea. 197. *Fildes v. Hooker*, 2 Meriv. 424. *Morphett v. Jones*, 1 Swanst.

172. *Nesbit v. Meyer*, 2 *ibid.* 223, *et vide* *Blore v. Sutton*, 3 Mer. 237. *Frame v. Dawson*, 14 Ves. 386. *Gregory v. Meghill*, 18 Ves. 328, *et vide supra*, p. 630.

(*h*) *Co. Lit.* 160. *b*.

(*i*) *Ibid.*

(*k*) *Ibid.* And so a stranger may rescue his goods if taken without cause. *Ibid.*

If the rent be in arrear, and the tenant (without having tendered the rent) rescue the goods, he will be liable to an action of *rescous* at the suit of the landlord. (*k*) A plea of recaption on a rescue must aver a fresh pursuit. (*l*) And if, after the goods are impounded, the tenant break the pound and rescue the goods, an action for *pound-breach* may be maintained by the landlord. (*m*) Both these actions, of *rescous* and pound-breach, however, have now fallen into disuse; and the usual remedy is by an action upon the case founded on the statute, 2 William and Mary, sess. 1, c. 5, s. 4, by which it is enacted, "That upon any pound-breach, or rescous, of goods or chattels distrained for rent, the party grieved shall, in a special action on the case for the wrong thereby sustained, recover *treble* damages and costs (*n*) against the offenders, or against the owners of the distress, in case the same be afterwards found to have come to their possession."

If the landlord unlawfully seize the goods of his tenant as a distress, as in the cases already mentioned, and the tenant do not rescue them, but suffer them to be impounded, he may replevy them; that is, he may retake his goods out of the pound, upon giving security to the officer that he will bring an action of replevin against the landlord for the seizure; and, if judgment be given against him, restore the goods. By replevin.

The statute 11 Geo. II. c. 19, s. 23, requires, "That the officer granting the replevin shall take in his own name a bond from the plaintiff, with two sureties in a sum double the value of the goods distrained, to be ascertained upon oath, conditioned to prosecute the suit with effect, and without delay, and for return of the goods; which bond

(*k*) Fitz. N. B. 101. (C.)Dod *v.* Monger, 6 Mod. 216.(*l*) Rich *v.* Woolly, 7 Bing. 655.(*n*) *I. e.* Treble costs, Lawson *v.*(*m*) Fitz. 100. (E.) But, if the distrainer quit possession, a re-taking of the goods is not a rescous.Story, *Ld. Raym.* 19. S. C. Carth. 321.

shall be assigned to the party avowing or making cognizance, upon request; and, if forfeited, may be sued upon in the name of the assignee. (o) The assignee may sue on the bond in the superior court, although the replevin be not removed out of the county court, averring that the plaintiff did not appear at the county court, and prosecute according to the condition of the bond. (p)

In an action on the replevin bond, it is not necessary to indorse the amount of debt and costs, pursuant to the second general rule Hilary Term, 2 Wm. IV., and fifth general rule Michaelmas Term, 3 Wm. IV.

If the sheriff omit to take a replevin bond, or lose it, or refuse to assign it, or if he take insufficient pledges, he will be liable to an action at the suit of the person avowing or making cognizance. (q)

Although the avowant elect to proceed under the 17 Car. II. c. 7, and the jury assess the damages and costs, yet he may also proceed against the sureties on the replevin bond, or against the sheriff for the loss of it. (r)

In an action by the sheriff on the replevin bond, it is not a good plea that the bond has been executed by one surety only, but it seems that the sheriff ought not to recover more than a moiety of the sum, composed of the rent which the distraining party established in the replevin suit to be due and the costs of the replevin. (s)

(o) See *Page v. Eamer*, 1 B. & P. 378. *Wilson v. Holiday*, 4 Mau. & Selw. 120. *Phillips v. Price*, 3 M. & S. 180.

(p) *Dias v. Freeman*, 5 T. R. 195. *Brackenbury v. Pell*, 12 East, 585.

(q) *Rowland v. Dakeyne*, 2 Dowl. Prac. Ca. 832. *Page v. Eames*,

supra. *Perrean v. Bevan*, 5 B. & C. 284, *et vide* 1 Wms. Saund. 195. n.

(r) *Perrean v. Bevan*, 5 B. & C. 284. 8 Dowl. & Ryl. 72. *Turner v. Turner*, 2 B. & B. 107. 4 Moore, 616.

(s) *Austen v. Howard*, 7 Taunt. 281, 327.

The two sureties are not liable beyond the amount of the penalty in the replevin bond and costs of suit on the bond ; (t) and their liability is confined to the rent due, at the time of the distress, with costs, and will not extend to subsequent rent becoming due. (u)

If the rent is less than the value of the goods, little difficulty can arise in applying the law as above stated, notwithstanding the conflicting decisions in the books. (v)

But if the rent exceeds the value of the goods, the question then arises, whether the landlord is, by means of the bond, to be placed in a better situation than he would have been in if he had pursued his replevin without the bond ? On this point, the authorities are not clear. In the modern case of *Hunt v. Round*, (w) the Court of King's Bench appears to have held, that the liability of the sureties did not extend beyond the value of the goods and double costs, and costs of the application, and, therefore, stayed proceedings against them on payment of the same. In the subsequent case of *Paul v. Goodluck*, (x) the case of *Hunt v. Round* was not mentioned, and it appears to have been taken as settled law, that the sureties were liable to the amount of the bond. (y)

The amount of the liability of the sheriff has been *vexata quæstio*. But it appears to be now settled that he is liable to the extent of the penalty in the bond given by the sureties. (z)

(t) *Hefford v. Alger*, 1 Taunt. 218.

(u) *Ward v. Henley*, 1 Y. & J. 285.

(v) See *Yea v. Lethbridge*, 4 T. R. 433. *Concannon v. Lethbridge*, 2 H. Bl. 36. *Evans v. Brander*, *ibid.* 347. *Baker v. Garratt*, 3 Bing. 56. *Scott v. Waithman*, 3 Stark. N. P. 168.

(w) 2 Dowl. Prac. Ca. 558, *et vide*

Chitty, N. P. Vol. II. p. 296, 6 edit.

(x) 2 Bing. N. C. 220.

(y) *Et vide* 2 Selw. N. P. 1202, 9 edit.

(z) *Paul v. Goodluck*, *supra*, *et vide* *Yea v. Lethbridge*, *Concannon v. Lethbridge*, *Evans v. Brander*, *supra*.

The sheriff is not bound to warrant the sufficiency of the sureties, it will be enough if they are apparently responsible; (u) but it will be for the jury to decide whether the sheriff has exercised a reasonable discrimination in admitting them as sureties. (v)

The condition of the replevin bond is not satisfied by a prosecution in the county Court, but the plaint, if removed by *recordari facias loquelam* into a superior Court, must be also prosecuted there, (w) and with success. (x)

After a delay of two years, the replevin cause was considered out of Court. (y)

The *recordari facias loquelam* contains in effect a direction to summon the parties, and if the sheriff omits to summon the defendant in replevin, who brings an action on the bond for the delay, and the defendant in the action on the bond pleads that the plaintiff did not appear when summoned, to which the plaintiff replies that he was not summoned, the defendant will not be responsible for the neglect of the sheriff. (z)

A reference to abitation without the privity of the sureties, will discharge them from their liability. (a) In an action against the sheriff for not taking sufficient sureties, the Court will not stay the action on an affidavit that the cause was referred without the consent of the sureties, that being subject of defence at the trial, (b) and the Court will permit the declaration to be amended. (c)

(u) *Hindle v. Blades*, 5 Taunt. 586.
225. 1 Marsh. 27.

(v) *Jeffery v. Bastard*, 4 Ad. & Ell. 823.

(w) *Vide Morgan v. Griffith*, 7 Mod. 280.

(x) See *Perreau v. Bevan*, 5 B. & C. 300.

(y) *Axford v. Perrett*, 4 Bing.

(z) *Harrison v. Wardle*, 5 B. & Ad. 146. 2 Nev. & M. 703.

(a) *Archer v. Hale*, 4 Bing. 464.
1 Moore & Payne, 285.

(b) *Dale v. Gordon*, 2 Moore & Sc. 532.

(c) 3 Moore & Sc. 339.

The mode of proceeding in this action at common law was By writ, by issuing an original writ directed to the sheriff, by which he was authorized to deliver the goods, and to determine the matter in the County Court. (a) But this proceeding has been long disused, (b) and the method now adopted is to levy a plaint in the County Court, the sheriff being authorized by the statute of Marlbridge, 52 Hen. III. c. 21, to deliver the goods, and to hold plea in replevin by plaint of any value, as he might at common law on a writ of replevin. (c)

Inferior Courts, not being hundred Courts, (d) may have prescriptive right to hold plea of replevin by plaint. (e)

Where the replevin has been sued by original writ, the plaintiff or defendant may remove the cause out of the County Court, into the Queen's Bench or Common Pleas, by writ of pone; (f) but where, as is now the practice, it is commenced by plaint, the mode of removing it is by a writ of *recordari facias loquelam*, which is a writ issuing out of Chancery, whereby the sheriff is commanded that, in his full county, he cause to be recorded the plaint, which is in the same county, without the King's writ, and that he have that record in the Court above, on a general return day, under his seal, and the seals of four lawful knights of his county, who were present at the recording; and that he prefix the same day to the parties, that they may be then there to proceed in the action. (g) Although the suit has been discontinued in the County Court, the plaint may yet be removed by *recordari*. (h) The *recordari facias loquelam* stays all further proceedings in the County Court, though delivered after *interlocutory* judgment, if before final judgment. (i)

(a) 2 Inst. 140.

(b) Replevin by writ is still frequent in Ireland.

(c) 2 Inst. 140.

(d) *Hallett v. Byrt*, 2 Salk. 580. Carth. 380. 1 Ld. Raym. 218.(e) *Wilson v. Hobday*, 4 M. & S. 121. Bac. Abr. *Replevin* (C.)

(f) F. N. B. 69. Tidd's Pr. 415, 9th edit.

(g) Com. Dig. *Pleader*, (3 K. 8.) Tidd's Pr. 415, 8th edit.

(h) F. N. B. 71. A. Gilb. Repl. 130.

(i) *Bevan v. Prothesk*, 2 Burr. 1151.

or *accedas*
and *curiam*,

Where the replevin has been sued by plaint in the Court of the lord of an inferior Court, it may be removed by a writ similar to the last, but commanding the sheriff, that taking with him four discreet and lawful knights of his county, he go in his proper person to the Court of the lord, (from which it is called a writ of *accedas ad curiam*,) and in that full Court cause to be recorded the plaint, &c. The four persons mentioned in this writ need not in fact be knights. (*i*)

or *certiorari*.

If the replevin be in a Court of Record, which may hold plea in replevin, it must be removed by *certiorari*. (*k*)

If the suit is removed by *certiorari* when it ought to be removed by *pone* or *recordari*, the Court may, it seems, exercise its discretion whether to entertain it or not. (*l*)

The plaintiff may remove the cause either by *pone* or *recordari*, without cause shewn, for it is in his own delay; but the defendant cannot remove it without cause shewn, and the cause usually shewn is, that the sheriff or his clerk is related to one of the parties, to which the sheriff cannot return that the cause is not true. (*m*) But neither the plaintiff nor defendant can remove a cause out of the lord's court, without cause shewn, for they cannot oust the lord of the profits of his jurisdiction, without some apparent reason. (*n*) Anciently, the cause alleged was examined before granting the writ, but it is now usual to issue it as a matter of course, without such examination. (*o*)

The goods may be replevied so long as they remain unsold; therefore, if at the expiration of the five days they are appraised but not sold, the tenant may still replevy them. (*p*)

(*i*) F. N. B. Tidd's Pr. 415, 9 edit.

(*k*) See Gilb. Distress, 135.

(*l*) Edwards v. Bowen, 5 B. & C. 206, et vide F. N. B. 69, m. note (*a*).
Tidd's Pr. 466, 9 edit.

(*m*) F. N. B. 70. Gilb. Repl. 137.

2 Inst. 339. Tidd's Pr. 146, 9 edit.

(*n*) 2 Inst. 339.

(*o*) Tidd's Pr. 416, 9th edition, Gilb. Rep. 135.

(*p*) Jacob v. King, 1 Mod. 135.

S. C. 5 Taunt. 451.

The goods being accordingly restored to the tenant, the tenant, in his declaration, must lay the venue in the county in which the distress was taken; or if the distress be taken in one county, and carried into another, he may lay the venue in either. (q) The name of the county must be stated in the margin; (r) but by the 3 & 4 Wm. IV. c. 42, s. 22, the Court in which any cause is pending, or any judge of such Court, may decree the issue to be tried in any other county than that in which the venue is laid. The tenant is, moreover, bound to shew the *locus in quo* the distress was taken; (s) or at least a place in which the landlord has had the distress in custody. (t) The nature and quantity of the goods must be described in the declaration with such certainty that the sheriff may make a redeliverance of them; though the tenant will not be bound to prove the exact quantity, but may recover less than the declaration alleges. (u)

Declaration
in replevin.

In answering to this declaration the landlord must *avow* the taking, and shew his right, and the cause for which he took them; or if the landlord's bailiff have made the distress, and the action be brought against him, he must *make cognizance*, and shew the landlord's right. At common law it was necessary for the landlord, if he were possessed of a term only, to shew the estate out of which his term was derived; (v) but by the statute 11 Geo. II. c. 19, s. 22, defendants in replevin may avow or make cognizance generally, (w) that the plaintiff in replevin, or other tenant of the lands, whereon the distress was made, enjoyed the same under a grant, or demise, at such a certain rent during the time

Avowry or
cognizance.11 Geo. II.
c. 19.

(q) Fitz. N. B. 69. (l.)

B. & P. 480.

(r) General rule, 4 Wm. IV. Selw. N. P. 1208, 9 edit.

(u) Bern v. Mattaire, Ca. temp. Hardw. 119, and Kempter v. Nelson, there cited.

(s) Ward v. Lavile, Cro. Eliz. 896. S. C. (Ward v. Lakin) Moore, 678. Bullythorp v. Turner, Willes, 475, et vide Potter v. North, 1 Saund. 286. note 1. F. N. B. 19.

(v) Scilly v. Dally, 2 Salk. 562. S. C. Ld. Raym. 331. Reynolds v. Thorp, Str. 796, et vide Selw. 1210, 9 edit.

(t) Walton v. Kersop, 2 Wils. 354. Abercrombie v. Parkhurst, 2

(w) Vide 2 Salk. 562, note.

wherein the rent distrained for was incurred, which rent was then, in arrear; and that the place where the distress was taken was parcel of the tenements for which the rent became due, but it is unnecessary to allege that the rent continued in arrear to the time of making the avowry. (x)

Avowries for distress for rent, varying the amount of rent reserved, or the times at which the rent is payable, are not now allowable. y)

If the defendant in replevin avows taking the goods for rent, it will be a contradiction on the record also to plead that the goods belonged to himself and others, assignees under a commission of bankruptcy against the party; the verdict, therefore, must be against the defendant in replevin on that issue, and on which the Court would refuse him costs. (x)

The statement of the fact of tenancy, (a) and of the terms of the tenancy, and description of the premises, (b) should be accurate. It will, however, be sufficient if it can be collected from the avowry, that the plaintiff was tenant, although the fact is not distinctly stated; (c) but the rent should be correctly stated. (d)

The statute of the 21 Hen. VIII. c. 19, enables the defendant to dispense with naming any person certain as tenant; the 11 Geo. II. c. 19, provides, that the defendant shall not be obliged to shew the landlord's title; but an avowry, not averring the lands to be within the fee or seignory of the avowant, is not, it seems, good within the first statute, nor will an avowry, stating that J. S. held the *locus in quo* as tenant to the defendant, under a demise thereof, by A. to W.,

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| (x) <i>Clarke v. Davis</i> , 2 Marsh. 386. | 6 Bing. 104. 3 Moore & Payne, 320. |
| S. C. 7 Taunt. 72 | (b) <i>Page v. Chuck</i> , 10 Moore, |
| (y) General rule, see 5 B. & Ad. | 264. |
| Appendix IV. | (c) <i>Innes v. Colquhoun</i> , 7 Bing. |
| (z) <i>Middleton v. Mucklow</i> , 10 | 265. 5 Moore & Payne, 63. |
| Bing. 400. | (d) <i>Brown v. Sayce</i> , 4 Taunt. 320. |
| (a) <i>Vide Philpott v. Robinson</i> , | |

at a certain rent for a term not expired, J. S. being the assignee of all W.'s estate and interest, and the rent being in arrear, be good under either or both of the statutes. (g)

Co-parceners and co-heirs in gavelkind ought to join in an avowry for rent; and tenants in common must avow for their separate portions. Joint-tenants may either join or sever: but if one joint-tenant or tenant in common have distrained for the rent due for both shares, and the action of replevin be brought against one, he should avow for his own share, and for the other make cognizance as bailiff of his co-tenant. (h)

To this avowry or cognizance the tenant may plead, 1. *non demisit* or *non tenuit*, which denies the demise, or tenure as set forth in the avowry, and throws the issue upon the defendant, who must prove a demise; and, therefore, if he only shew an agreement for a lease, it is insufficient; (i) though it is otherwise if the tenant has occupied and paid rent. (k) The terms of the tenancy must be proved as laid; thus a variance as to the amount of rent is fatal, (l) but it is no variance if it appear that the plaintiff hold for a less term than that stated in the avowry, (m) 2. *eviction*, and consequent suspension of the rent, where the issue rests upon the plaintiff, but to support this plea, there must be proof of actual eviction, and not merely trespass: (n) 3. *riens in arrear* (o); or 4. *levie per distress*, which throw the burthen of proving that the rent is in arrear upon the landlord: or 5. tender of arrears before the impounding, which admits the tenure and arrears, and leaves the proof of the tender upon the tenant. The party pleading the tender must be accurate in his plea, and prove a

Plea to
avowry.

(g) *Banks v. Angell*, 7 Ad. & Ell. 843.

(h) *Vide supra*, 441, 432.

(i) *Dunk v. Hunter*, 5 B. & A. 322.

(k) *Knight v. Bennet*, 3 Bing. 361.

(l) *Brown v. Sayce*, 4 Taunt. 320. *Ireland v. Johnson and others*, 1 Bing. N. S. 167.

(m) *Forty v. Imber*, 6 East, 434.

(n) *Neale v. Mackenzie*, 2 C., M. & R. 85. 5 Tyrw. 1106.

(o) *Vide Selw. N. P.* 1224, 9 edit.

tender to the amount stated. (p) But though the tenant may deny the demise, he cannot, in this, any more than in any other action, call in question the title of his landlord; and, therefore, *nil habuit in tenementis* is a bad plea in replevin; (q) but if he did not receive the possession of the land from the avowant, he may, under the issue *non tenuit modo et forma*, rebut the avowant's title, by shewing that he paid the rent to the avowant under circumstances that did not entitle him to the rent. (r) It has been laid down as a general rule that a notice, or plea of set-off is bad in replevin. (s) But the tenant may by special plea shew that he has made payments in behalf of his landlord, and so set them off against the landlord's demand: thus he may plead compulsory payment to the original landlord, or to the owner of a rent charged upon the land, under a threat of distress; (t) or a payment of the land-tax agreeably to the provisions of the act. (u) And he may also set-off the ground-rent, paid by him to the superior landlord against growing rent, though not then due. (v) *Actio non accrevit infra sex annos*, is a good plea in replevin within the 21 Jac. I. c. 16, s. 3. Pleas in bar in replevin are, however, within the general rules established by all the Courts, Hilary Term, 4 Wm. IV. (w)

Judgment.

The judgment for the plaintiff is that he shall retain the goods, and recover damages. For the defendant a return of the distress irreplevisable. And if the sheriff return to the writ *de retorno habendo*, that the goods have been eloigned,

(p) *John v. Jenkins*, 1 Cr. & M. 227. 3 Tyrw. 170.

(q) *Et vide Cooper v. Blandy*, 1 Bing. N. C. 45. *Panton v. Jones*, 3 Camp. 372.

(r) *Rogers v. Pitcher*, 6 Taunt. 209. *Gravenor v. Woodhouse*, 1 Bing. 38. *Fenner v. Duplock*, 2 Bing. 10. *Hofcroft v. Keys*, 9 Bing. 613. *Gregory v. Doidge*, 3 Bing. 474. *Brook v. Biggs*, 2 Bing. N. C. 772.

(s) *Absolom v. Knight*, Barnes, 450. Selw. N. P. 1285 9 edit.

(t) *Sapsford v. Fletcher*, 1 T. R. 511. *Doe v. Hare*, 2 Crompt. & Mee. 145. *Taylor v. Zamira*, 2 Marsh. 220. S. C. 6 Taunt. 534.

(u) *Andrew v. Hancock*, 1 B. & B. 37, *supra*.

(v) *Carter v. Carter*, 2 Moo. & P. 732.

(w) *Vide supra*.

the practice was, that the landlord ought to have a distress *in withernam*, which cannot be replevied until the original distress be produced. But a less circuitous practice has been adopted in modern times, for now, upon the return of an *elongata* to a writ of *retorno habendo*, it is no longer necessary to sue out a *capias in withernam* against the plaintiff or a *scire facias* against the pledges or the sheriff; but the defendant, in case the sheriff has taken no pledges at all, or such as are insufficient, may bring an action on the case against him. (u)

If the plaintiff in replevin dies after declaration and before avowry, no writ of *retorno habendo* can be issued. (v)

By the statute 11 Geo. II. c. 19, s. 22, if the plaintiff in an action of replevin, founded upon a distress for rent, quit rents, relief, heriot, or other service, shall become nonsuit, discontinue his action, or have judgment against him, the defendant shall recover double costs of suit. (w)

The Court will, however, stay proceedings in replevin on a distress for rent in arrear, on the application of the plaintiff upon payment of the rent, and of all costs up to the time of the application, including the costs of the application, (x) but not upon payment of the costs up to the time of tender, where such tender was made after the distress, and before the goods were replevied. (y)

In replevin by an under-tenant against a landlord, who, towards discharging the rent due to himself from his immediate tenant, had distrained, as his bailiff, upon the under-tenant, for the amount of rent due from him to the tenant, it was held that the tenant was not a competent

(u) See 1 Saund. 195. b. note.

Bradyll v. Ball, 1 B., C. & C. 427.

Rous v. Patterson, 16 Vin. 399, 400.

(v) Cutfield v. Corney, 2 Wils. 83.

(w) *Et vide* Selw. N. P. 1231, 9 edit.

(x) Vernon v. Wynne, 1 H. BL. 24.

(y) Hopkins v. Shrole, 1 B. & P.

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witness to prove the amount of rent due from the under-tenant. (*x*)

By action for
illegal distress.

If the landlord be guilty of an illegal, excessive, or irregular distress; or if, having lawfully taken the distress, he abuse it, he will be liable, according to the nature of the grievance, to an action of trespass or case. And if the broker enters on the premises, demanding the rent and his costs of levy, which are paid, it does not lie with the landlord in an action against him for an illegal or excessive distress, to deny the distress, although the broker makes no inventory and touches nothing on the premises. (*a*) The proper mode of trying the *validity* of a distress is by action of replevin, as we have already seen, or by trespass. (*b*)

For excessive
distress.

If the landlord take *an excessive* distress, an action of trespass is not in general maintainable; (*c*) the proper remedy being by action upon the case, founded upon the statute of Marlbridge, (*d*) by which it is enacted, "that distresses shall be reasonable, and he that taketh great and unreasonable distresses shall be grievously amerced for the excess of such distress."

Where the tenant tendered the rent before levy, and the distress was excessive, it has been held that case as well as trespass would lie. (*e*)

In order to entitle a party to maintain an action for taking an excessive distress, it is not necessary that express malice should be shewn; it is sufficient that the goods taken appear

(*x*) *Upton v. Curtis*, 1 Bing. 210, *et vide* *King v. Baker*, 4 Nev. & M. 228.

(*a*) *Hutchins v. Scott*, 2 Mees. & Wels. 809, *sed vide* *Hurry v. Rickman*, 1 Moo. & Rob. 126.

(*b*) *Anscombe v. Shore*, 1 Campb. 285.

(*c*) *Lynne v. Moody*, Str. 851. *Hutchins v. Chambers*, Burr. 590.

Crowther v. Ramsbottom, 7 T. R. 658. *Whitworth v. Smith*, 1 Moo. & Rob. 193. 6 C. & P. 250. *Gilb. Distress*. 59.

(*d*) 52 Hen. III. c. 4.

(*e*) *Holland v. Bird*, 10 Bing. 15. 3 M. & Sc. 363. *Branscomb v. Bridges*, 1 B. & C. 145. 2 Dowl. & Ryl. 256.

to be greatly disproportionate to the rent due. On the other hand, every trifling excess will not render the landlord liable to this action; nor will he be liable if he distrain for more rent than is due, unless the distress taken be of greater value than the sum due; (d) and where there is but one thing which can be taken, so that the landlord must either take it, or go without his distress, an action will not lie, although the value of the thing greatly exceed the sum in arrear. (e)

In an action for an excessive distress, the first question is the sum which the goods would have sold for at the broker's sale. (f)

In a case in which the landlord had seised growing crops and beasts of the plough, the jury found that the crops were capable of being valued at the time of seizure, and that the distress was excessive; it was held that the measure of damages was not the full value of the crops, but the inconvenience and expense which the tenant sustained in losing the dominion and management of them, or if he had replevied, in procuring sureties to a larger amount than he otherwise would have been put to. But that as to the beasts of the plough, as the landlord had a right to resort to subjects of distress *immediately* available, he was not liable to an action for taking them when the only other sufficient distress was the growing crops. (g)

In an action for an excessive distress, if the defendant plead that the whole sum distrained for was due, on which the plaintiff joins issue, the defendant may shew that rent is in arrear, although subsequently to such rent becoming due, other rent for the same premises had become due and been distrained for. (h)

(d) *Wilkinson v. Terry*, 1 Moo. & Rob. 377.

(e) *Field v. Mitchell*, 6 Esp. 71.
et vide Avenell v. Croker, 1 Moo. & Malk. 172.

(f) *Wells v. Moody*, 7 C. & P. 59.

(g) *Piggott v. Birtles*, 1 Mees. & W. 441.

(h) *Gambrell v. Earl of Falmouth and another*, 4 Ad. & Ell. 73.

A landlord having distrained furniture and beasts of the plough, caused them to be appraised;—and by the appraisal it appeared that, without the beast of the plough, the distress would be insufficient to satisfy the rent. A sale being had, the beasts were first sold; and then part of the furniture: and it was ascertained by the result of the sale that the furniture alone would, in fact, have satisfied the rent. The tenant thereupon commenced an action upon the case, founded upon the statute 51 Hen. III. c. 4, (which prohibits the distraining of beasts of the plough so long as other goods remain to be distrained;) and *Abbott, J.*, having directed the jury, that if they thought the defendant had reasonable ground for supposing that the goods were sufficient to satisfy the rent and expenses, without the sale of the beasts, and that the taking of these was unreasonable, they should find for the plaintiff, otherwise for the defendant; the jury found for the defendant. A rule was obtained for a new trial, and it was contended that the landlord must take beasts of the plough at his peril; that he ought rather to return for a second distress; and that at all events he was bound to sell the beasts the last thing. But the Court of Exchequer supported the verdict: and were of opinion that if the original taking were lawful, the result of the sale could not make it unlawful; and it was observed that there was nothing in any statute directing beasts of the plough to be last disposed of. (i)

Where a landlord's agent went upon the tenant's premises, walked round them, and gave a written notice that he had distrained certain goods lying there for an arrear of rent, and that unless the rent was paid, or the goods replevied within five days, they would be appraised and sold, and then went away, not leaving any person in possession: it was held, that this was a sufficient seizure to give the tenant a right of action for an excessive distress: and that quitting the premises without leaving any one in possession, was not an

(i) *Jenner v. Yolland*, 6 Price, 4. 2 Chitt. Rep. 167.

abandonment of the distress ; the stat. 11 Geo. II. c. 19. s. 10, giving the landlord power to impound or otherwise secure on the premises goods distrained for rent in arrear. (*k*)

If the landlord proceed to distrain after the tenant has tendered the rent, the plaintiff need not, in an action for an excessive distress, allege or prove the precise amount of rent due. (*l*) Nor does the tenant waive his right of action by entering into an arrangement with the landlord respecting the sale of the goods seized. (*m*)

Where the tender is not made till after the distress has been impounded, or even if the tenant tender before the impounding, but after the distress, an action on the case will not lie for the detainer : (*n*) nor can an action for an excessive distress be maintained after a judgment recovered in replevin. (*o*)

By any irregularity in taking the distress the landlord became at common law a trespasser *ab initio*, and the tenant might have maintained an action against him accordingly. (*p*) But by the statute 11 Geo. II. c. 19, s. 19, " where any dis-
tress shall be made for any (*q*) rent justly due, and any irregu-
larity or unlawful act shall be afterwards done by the party
distraining, or his agent, the distress shall not be deemed
unlawful, nor the distrainer a trespasser *ab initio*, (*r*) but the
party grieved may recover satisfaction for the special damage
in action of trespass, or on the case, at the election of the
plaintiff; and if he recover, he shall have full costs : pro-

For irregular
distress.

11 Geo. II.
c. 19.

(*k*) *Swann v. Earl of Falmouth*, 8 B. & C. 456, *et vide* *Hutchins v. Scott*, *Hurry v. Rickman*, *supra*, 649.

(*l*) *Sells v. Hoare*, 1 Bing. 401.

(*m*) *Ibid.* & *Willoughby v. Backhouse*, 2 B. & C. 821.

(*n*) *Sheriff v. James*, 1 Bing. 341; and so it should seem even if he tender *before* the impounding, but after the distress, see *Anscomb*, in *Anscombe v. Shore*, Camp. 285.

Lindon v. Hooper, Cowp. 414.

(*o*) *Phillips v. Berryman*, Selw. N. P. 693, 9 edit.

(*p*) *Dod v. Monger*, 6 Mod. 216.

Griffin v. Scott, Ld. Raym. 1424.

S. C. Str. 717.

(*q*) See *Whitworth v. Smith*, 5 C. & P. 257. 1 Moo. & Rob. 193.

(*r*) *Ibid.* *Gates v. Bayley*, 2 Wils.

313. *Dye v. Leatherdale*, 3 Wils.

20. *Oxley v. Watts*, 1 T. R. 12.

vided, however, that no such tenant or lessee shall recover in such action, if tender of amends have been made before action brought."

The construction which has been put upon this statute is, that the *election* of the tenant to bring trespass, or case, must be regulated according to the subject matter of the injury complained of; and that he must adopt trespass where, by the general rules of law, trespass would be the proper remedy; and case, where case would be so. (v) So that the only difference which this statute has made in the law is, that where the landlord begins the distress in right, and carries it on in wrong, he can only be charged from the time when the wrong commenced.

Where a person entered under a warrant of distress for rent, and continued in possession of the goods upon the premises for fifteen days, during the four last of which he removed the goods, which were afterwards sold under the distress, the Court of King's Bench, having laid down the above rule of construction, were of opinion, that although the defendant could not be charged as a trespasser *ab initio*, he might be charged for his *unlawful continuance* upon the premises in an action of trespass *quare clausum fregit*; but that it would have been otherwise if the defendant, having lawfully entered to distrain, had been guilty of any *irregularity*. (w) This principle had been previously acted upon by Lord *Ellenborough*, C. J., at *nisi prius*; his lordship ruling that trespass did not lie, where the defendant, having entered and seized the plaintiff's goods as a distress, sold them without their having been previously appraised pursuant to the statute 2 William and Mary, c. 5. (x)

Where the landlord distrained standing corn before it was ripe, and sold it with other goods before the five days had

(v) *Winterbourne v. Morgan*, 11 East, 395. *Messing v. Kemble*, 2 Camp, 115.

(w) *Ibid.*

(x) *Messing v. Kemble*, *supra*.

elapsed, the Court of King's Bench held, that no action under the 2 William and Mary, c. 5, s. 28, lay against the landlord by the tenant, in respect of the sale of the corn within the five days; because the sale, being altogether void, did not change the property, and the plaintiff sustained no legal damage from it. (x)

If the landlord *abuse* the distress, trespass is the proper remedy; (y) and if the person making the distress turn the party out of possession, or if he continue in possession an unreasonable time beyond five days, the tenant may declare in trespass or in case. (z) but for impounding the goods in a wrong county he will not be liable in trespass, (a) nor will trover lie where goods have been merely irregularly sold under a distress. (b)

For abuse of distress.

A promissory note given for the amount of the rent will not of itself suspend the distress until the note becomes due. (c)

SECTION III.

OF RELIEF FOR THE TENANT AGAINST THE LANDLORD'S PROCEEDINGS FOR FORFEITURE.

Where the tenant has been guilty of a breach of his covenant by omitting to pay his rent at the exact period, the Courts both of Law and Equity, considering the clause of re-entry to be merely inserted in the lease for the landlord's security, have interfered in the tenant's behalf, upon his

By courts of law and equity.

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|--|-------------------------------------|
| (x) Owen v. Legh, 3 B. & A. 470. | Vol. II. p. 427. |
| y) Lynne v. Moody. 2 Str. 851. | (a) Gimbart v. Pelah, 2 Str. 1272. |
| Gilb. Dist. 60. | (b) Wallace v. King, 1 H. Bl. 13. |
| (z) Etherton v. Poplewell, 1 East, 139. | (c) Davis v. Gyde, 4 Nev. & M. 462. |
| Winterbourne v. Morgan, 11 East, 306, <i>et vide</i> Chitty Plead. | |

satisfying the rent and any damage which the landlord may have sustained in consequence of his omission. (c)

Relief not given upon other covenants than for payment of rent, or a sum certain.

Whether this equitable relief can be extended to other forfeitures has been in modern times much debated. In the case of *Sanders v. Pope*, (d) where a forfeiture had been incurred by the tenant's neglecting to lay out a stipulated sum of money *in repairs* within a given time, Lord Chancellor *Erskine*, notwithstanding the contrary opinion already given by Lord *Eldon* in *Wadman v. Calcraft*, (e) relieved the tenant, conceiving that a due compensation might be made to the landlord. This decision, after being questioned, in *Hill v. Barclay*, (f) has now been directly overruled in the Court of Exchequer by the opinion of three barons against one; (g) and it seems to be settled that equity will only relieve where the forfeiture has been incurred by neglecting to pay a sum of money, the interest upon which may be calculated to a certainty, and the landlord thereby compensated for the inconvenience he may have sustained by the tenant's withholding the payment, with a degree of accuracy which cannot be attained in other cases. Conformably to this doctrine, equity will not relieve against a forfeiture, incurred by the tenant's assigning the estate without a license; (h) or by his neglecting to repair the premises, (i) or keep them insured, (k) or by his making a way through the demised

(c) *Vide* *Archer dem. Hankey v. Snapp*, Andr. 341. *Phillips v. Doelittle*, 8 Mod. 345. *Smith v. Parks*, 10 Mod. 383. *Goodtitle v. Holdfast*, Str. 900. Anon. 1 Wils. 75. *Duckworth v. Tunstall*, Barnes, 184. *Goodright dem. Stevenson v. Noright*, BL Rep. 746. *Pure dem. Withers v. Sturdy*, Bull. N. P. 97. *Wadman v. Calcraft*, 10 Ves. 67. *Davis v. West*, 12 Ves. 475. *Hill v. Barclay*, 16 Ves. 405. *Lovat v. Lord Ranelagh*, 3 Ves. & Bea. 24.

(d) 12 Ves. 282.

(e) 10 Ves. 69.

(f) 18 Ves. 56.

(g) *Bracebridge v. Buckley*, 2 Price, 200. *Per Thomson*, C. B.,

Graham, B., and Richards, B., contra, Wood, B.

(h) *Wafer v. Mocato*, 9 Mod. 112. S. C. 2 Eq. Ca. Abr. 58. *Hill v. Barclay*, 18 Ves. 63. And see *Northcote v. Duke*, 2 Eden. 319, and the editor's note, S. C. Amb. 511.

(i) *Hill v. Barclay*, 16 Ves. 402. 11 Ves. 56. But see *Hack v. Leonard*, 9 Mod. 91. *Webber v. Smith*, 2 Vern. 103.

(k) *Rolfe v. Harris*, 2 Price, 206. n. *Reynolds v. Pitt*, *ibid.* 212. n. 19 Ves. 134. *White v. Warner*, 2 Meriv. 459. *Green v. Bridges*, 4 Sim. 96. *Thompson v. Guyon*, 5 Sim. 6, *et vide supra*, 280.

premises contrary to express covenant, (*k*) or by cultivating the lands in a manner prohibited by the lease, (*l*) or by exercising a forbidden trade; (*m*) and where an ejectment was brought upon a forfeiture for breach of covenant for payment of rent, and also of other covenants, Lord *Eldon*, C., refused to relieve the tenant. (*n*)

In cases similar to the last, the Court will not permit the landlord to take execution upon a verdict for a breach of covenant by non-payment of rent, but will compel him to proceed on some covenant, against the breach of which the Court will not relieve. (*o*)

If a lease is granted with a proviso enabling the landlord to re-enter and determine the lease on non-performance of any of the covenants, and with a covenant to renew at the end of the term if it should not be sooner determined by the lessee's acts or defaults, and the lease is permitted to expire, after which the tenant is permitted to remain in possession until an ejectment is brought against him by the lessor, the Court will not, on a bill filed by the tenant, grant an injunction, in case of proof that during the lease there were breaches of the covenants, of which the lessor was uninformed. (*p*)

But the Courts of Equity are only closed against the tenant, where the forfeiture is incurred by his wilful and culpable neglect to fulfil the terms of his covenant, and not in cases where the omission has been occasioned by inevitable accident. Indeed the rule to be applied to all cases (except that of forfeiture for non-payment of rent,) seems to be, that Courts of Equity will relieve "where the omission and consequent forfeiture are the effect of inevi-

Unless the forfeitures have been incurred by inevitable accident.

(*k*) *Descarlett v. Dennett*, 9 Mod. 22.

(*l*) *Lovat v. Lord Ranelagh*, 3 Ves. & Bea. 24.

(*m*) *Macher v. Foundling Hospital*, 1 Ves. & Bea. 188.

(*n*) *Wadman v. Calcraft*, 10 Ves. 67.

(*o*) See *Lovat v. Lord Ranelagh*, 3 Ves. & Bea. 30.

(*p*) *Thompson v. Guyon*, 5 Sim. 65.

table accident, and the injury or inconvenience arising from it capable of compensation: but where the transgression is wilful, or the compensation impracticable, the Courts will refuse to interfere. (*p*)

Relief under
the statute 4
Geo. II. c. 28.

It was formerly competent to the ejected tenant to offer to the landlord the rent and costs *at any time* after execution in order to found an application to a Court of Equity for relief, and applications for indulgence at any time before execution executed, appear to have been successful even at law. (*q*) The statute 4 Geo. II. c. 28, (which it has been already shown gives the landlord a more speedy entry for non-payment of rent than he had at common law,) enacts "that in case the tenant shall suffer judgment to be recovered on the ejectment, and the execution to be executed thereon, without paying the rent and arrears together with full costs, and without filing any bill *for relief in Equity* within *six* calendar months after such execution, he shall be barred and foreclosed from all relief in law or Equity, other than by writ of error," &c. And by section 4, of the statute, it is provided, "that if the tenant shall at any time *before the trial* in the ejectment pay or tender to the landlord or pay into Court all the rent and arrears, together with the costs, then all further proceedings in the ejectment shall cease and be discontinued." After the passing of this act, it was urged, that the legislature did not mean to take away the discretionary power before exercised in staying the proceedings, but only made compulsory upon the Court to interfere if the tenant applied before trial: it was resolved, however, that after trial the Court cannot now relieve the tenant, by staying the proceedings in the ejectment on payment of the arrears of rent and costs. (*r*)

If the lease is assigned by way of mortgage, the mortgagee

(*p*) *Vide Rolfe v. Harris*, 2 Price, p. 635, note (c.)
210. n.

(*q*) *Doe dem. Hitchins v. Lewis*, East, 363. *Doe dem. Harris v. Burr*. 619, *et vide* cases cited *supra*,
(*r*) *Roe dem. West v. Davis*, 7 Masters, 2 B. & C. 490.

will have the same benefit of the statute as the lessee might have had. (s)

Where an application is properly made to a Court of Equity under the statute, the Court is bound to grant the application, provided within forty days after the filing of the lessor's answer the tenant bring into Court the sum which the lessor shall swear in his answer to be due, together with the costs to be taxed of the action of ejectment. (t) But it seems that the payment of the money into Court will in some cases be dispensed with; for where there had been various dealings between landlord and tenant so as to produce an account too complicated to be taken at law, and the landlord brought an ejectment for non-payment of rent, and the tenant filed a bill, before judgment at law, for an account upon those dealings, and to have the balance applied to the liquidation of the rent due, Lord *Redesdale* held, that upon such a bill there was no necessity for the tenant's bringing the rent into Court under the statute. (u)

And where a tenant claimed against his landlord for unliquidated damages, caused by the cutting of timber in pursuance of a power in the lease, and the landlord having brought an ejectment for the non-payment of rent, the tenant filed a bill stating his claim, and charging that if it were ascertained there would not be a year's rent due; and the damages were ascertained by an issue, 103*l.* 6*s.*; the tenant was restored to possession, on paying the arrears due by him; and the Court decreed to him an account of the mesne profits, and that he should have credit for the 103*l.* 6*s.* (v) But where the question is not of a nature too complex to be tried at law, and, consequently, capable of being brought forward in the action of ejectment for non-payment of rent, a bill does not lie by the tenant for an account, and to be

(s) Doe dem. *Whitfield v. Roe*, 3 & Lefr. 305.
Taunt. 402.

(t) Sect. 3.

(u) *O'Conner v. Spaight*, 1 Sch.

(v) *Beasley v. Darcy*, 2 Sch. &
Lefr. 403. n. (b.)

restored to possession on payment of what shall appear due, without bringing the rent and costs into Court. (w)

Whether this statute extends to all ejectments for rent in arrear half a-year?

A question has been raised whether this statute extends to cases, other than those in which half a-year's rent is in arrear, and *no sufficient distress is to be found upon the premises?* And in a case where the limited construction was contended for, Lord *Ellenborough*, C. J., said "The statute is more general in its operation; for though the fourth clause has the word *such* (such ejectment), yet the second clause to which it refers is in the disjunctive; stating first that in *all* cases between the landlord and tenant, when half a-year's rent shall be in arrear, and the landlord has a right of re-entry for non-payment thereof he may bring ejectment, &c., *or* in case such ejectment, &c., and no sufficient distress, &c., *then and in every such case* the lessor shall recover judgment and execution, &c." (x) But the statute does not appear to warrant this extensive construction; which supposes the second section to be disjoined by the particle *or*, so as to contain two cases in which the statute may be resorted to, (*viz.* one where half a-year's rent is in arrear, and the lease contains a clause of re-entry; the other where there are these facts, but there is also the absence of a sufficient distress :) and then concludes that the words *such* ejectment in the fourth clause apply to either; whereas, in fact, the two parts of the section are wholly dependent upon each other, constituting only one predicament, the latter part merely adding another requisite, *viz.* the absence of a sufficient distress, to complete the landlord's title to the benefit of the statute, where the half-year's rent is in arrear, and the lease contains a clause of re-entry. (y)

(w) *O'Mahony v. Dickson*, 2 Sch. East, 363.
& Lefr. 400.

(x) *Roe dem. West v. Davis*, 7 Wandlass, 7 T. R. 117.

(y) *Vide Doe dem. Forster v.*

SECTION IV.

OF THE TENANT'S RELIEF AGAINST PENALTIES,
COVENANTS, &c.

It has been already stated, that where a sum is agreed to be paid for the non-performance of agreement, questions of some nicety arise whether the sum is to be considered in the nature of a penalty as liquidated damages; (x) but it is clear law, that if it is to be considered in the light of a penalty, and upon breach of the covenant, the lessor proceeds at law to recover the penalty, equity will interfere: as if the tenant covenant not to plough a certain portion of the land, under a penalty of 100*l.*, and the tenant plough the land, and the lessor bring an action to recover the penalty, equity will grant an injunction; and by directing an issue to try *quantum damnificatus*, compel the lessor to take only so much as amounts to a compensation for the breach of covenant. (a) The same principle prevails if a certain stipulated sum is to be paid for the non-performance of several acts of different degrees of importance. (b) But if the act to be performed is single, as an agreement to pay a certain additional sum for every acre converted into tillage, the sum is recoverable as liquidated damages. (c)

Relief against
a penalty in-
curred by the
tenant.

Where a lessee covenanted to lay out 200*l.* upon the premises, and laid out but 30*l.*, and after several years had ex-

(x) *Supra*, 103.

(a) *Lowe v. Peers*, Burr. 2228. *Sloman v. Walker*, 1 Br. Ch. Ca. 418. *Hardy v. Martin*, *ibid.* n. *Barrett v. Blagrove*, 5 Ves. 555. 1 Cox, 27.

(b) *Boys v. Ancell*, 5 Bing. 390. N. S. *et vide supra*, 103.

(c) See *Farrant v. Olmius*, 3 B. & A. 692. *Denton v. Richmond*,

2 Cr. & J. 734. *Jones v. Green*, 3 Y. & J. 298, *et vide supra*, 243. *Lowe v. Peers*, *sup.* *Woodward v. Gyles*, 2 Vern. 119. *Ponsonby v. Adams*, 2 Br. P. C. 431. *Rolfe v. Peterson*, *ibid.* 436. *Benson v. Gibson*, 3 Atk. 396. *Ashley v. Wildon*, 2 B. & P. 436. *Street v. Rigby*, 6 Ves. 818.

pired, the lessor brought an action upon the covenant and recovered 150*l.* damages; the Court refused either to relieve the tenant against the damages, or to order the money to be laid out in improvements, although it was considered to be a hard case on the tenant. (c)

A case under peculiar circumstances was heard before Lord *Eklon*, in which he gave relief against the landlord, by ordering a restoration of the stock on the farm, seized under a bill of sale, given to the landlord on the ground that the landlord would not, by his answer, directly swear the sum was due, on which he was authorized to make the seizure. (d)

Injunctions to restrain the landlord from cutting ornamental trees.

Where the lessor reserved to himself a right of cutting the trees upon the premises demised, and afterwards upon the tenant's projecting some improvements in the grounds, sent his surveyor to meet the tenant's surveyor, and approving of the proposed alterations, consented to the cutting down some of the trees, and leaving others in clumps, as ornamental timber; the Court of Chancery granted an injunction to restrain the lessor from subsequently cutting down the trees, upon the mere suggestion that he had sent a surveyor to mark them for cutting, the Lord Chancellor observing that he should not wait till they were cut down. (e)

Tenant cannot resort to equity for money paid in his own wrong;

Where the tenant having a right to deduct for the land-tax, omits to deduct, and pays his full rent, a bill does not lie to recover back the tax, which ought to have been deducted. (f) And where a bill was brought by a tenant to be relieved out of the arrears of rent for taxes which he had paid, on account of rent reserved to a charity that appeared to be exempted from taxes, the bill was dismissed with costs. (g)

or which is the subject of set-off.

Neither will a Court of Equity interfere to allow the tenant

(c) *Barker v. Holder*, 1 Vern. 316.

(f) *East v. Thornbury*, 3 P. Wms.

(d) *Nutbrown v. Thornton*, 10 Ves. 159.

127, *supra*. 629.

(g) *Willey v. The Cooper's*

(e) *Jackson v. Cator*, 5 Ves. 688.

Company, *ibid.* n. [B.]

to retain out of the rent a sum which he might set-off as money paid to the use of the landlord. (*h*)

A Court of Equity will not suffer a tenant to set up a title against his landlord. (*i*) Nor can a tenant file a bill of interpleader against his landlord on notice of ejectment by a stranger adverse to the landlord. (*k*) But if different parties claim the rent, such as trustees for the separate use of a married woman and the husband, the Court will, on the motion of the plaintiff and the consent of the defendants, order the tenants to pay the rent into Court. If the tenants are not parties to the suit, they are not competent to make such a motion. (*l*)

When tenant may file a bill of interpleader against his landlord.

The rule that a tenant cannot file a bill of interpleader against his landlord does not hold, where the question arises upon the act of the landlord subsequent to the lease, (*m*) or other commencement of the relation of landlord and tenant. (*n*) And where two persons claim the rent, neither of whom has been acknowledged by the tenant, he may file a bill of interpleader for the purpose of ascertaining to which of the claimants it is to be paid. (*o*)

The lessee will be liable under his covenant to pay rent, although the demised premises may be consumed by fire. (*p*) In some former cases, where the landlord insured, and upon the premises being consumed, *received the insurance money and neglected to rebuild*, a Court of Equity interfered to enjoin the landlord from proceeding in an action for the rent, until he should have rebuilt the house; and, in case of his refusal, gave the tenant the option of surrendering his lease. (*q*) But the law is now settled to the contrary, and it is clear, that

Tenant will not be relieved from payment of rent when the premises are burnt,

though the landlord may

(*h*) *Waters v. Weigall*, Anstr. 675.

(*n*) *Clarke v. Byne*, 13 Ves. 383.

(*o*) *Hodges v. Smith*, cited 16

(*i*) *Wilson v. Lord J. Townsend*, 2 Ves. jun. 696. *White v. Foljambe*, 11 Ves. 344.

Ves. 203.

(*p*) *Supra*, 227.

(*k*) *Dungey v. Angove*, 2 Ves. jun. 304.

(*q*) *Camden v. Morton*, 2 Eden.

219. *Brown v. Quilter*, 2 Eden,

219. *S. C. Ambl.* 619. *Steele v.*

Wright, cited 1 T. R. 708. And

see *Cutter v. Powell*, 6 T. R. 323.

(*l*) *Belbee v. Belbee*, 6 Madd. 28.

(*m*) *Cowtan v. Williams*, 9 Ves. 107.

have received
insurance
money.

the Courts will not now assist the tenant under these circumstances. (s)

Equity, however, afforded relief in a case in which a piece of land had been demised at a small annual rent, with a reservation of so much *per wey* of coals, to be obtained from the premises, and a covenant by the tenant to raise 900 weys yearly, if so much good merchantable coal could be had, and with a proviso relieving the tenant for his rent, in case, after using due diligence, 900 weys a-year could not be obtained; or if all the coal, except the pillars, should be worked. The colliery becoming not worth working, the tenant offered to pay for all the coal that could be got, and was relieved from the future rent and his covenant to work the mine. (t)

nor where
premises are
destroyed by
floods, &c.

Where the premises have been destroyed by floods, or where the tenant is kept out of possession by rebels or enemies, there is no equity to relieve him from the payment of his rent. (u)

(s) *Holtzapffel v. Baker*, 18 Ves. 115. *Leeds v. Cheetham*, 1 Sim. 146. *Supra*, 227, *et vide* *Hare v. Grover*, 2 Anst. 576.

(t) *Smith v. Morris*, 2 Br. Ch. Ca. 311.

(u) *Harrison v. Lord North*, 1 Ch. Ca. 83.

CHAPTER THE THIRD.

Of the Landlord's and Tenant's Remedies against Strangers.

WHERE a stranger is guilty of an injury to the estate demised, the landlord, in respect of his reversionary interest, may charge him, provided the injury be of such a nature as to affect the reversion; and in that case he may recover proportionable damages. But as the injury is not immediate, but is consequential to the landlord upon the act of the wrong-doer, trespass will not lie by the landlord for such an injury, but his proper remedy is by an action upon the case. (a)

1. The landlord's remedies against strangers.

If, however, a stranger enter upon the tenant, and *cut down* trees, the landlord, immediately, upon their severance, acquires such a possession as will enable him to maintain trover for them. (b)

Where the reversioner brought an action on the case for an injury to his reversion, and stated in his declaration that

(a) 2 Rol. Abr. 551. l. 46. Jefferson v. Jefferson, 3 Lev. 130. Biddleford v. Onslow, *ibid.* 209. Panton v. Isham, *ibid.* 359. S. C. 1 Salk. 19. Jesser v. Gifford, Burr. 2141. Evelyn v. Raddish, Holt's N. P. 543. (b) Harlakendan's case, 4 Rep. 62. b. Berry v. Head, Palm. 327. S. C. Cro. Car. 242.

he was seized in his demesne as of fee, of a certain close, &c. which said close at the time of the grievance *was and still is* in the possession of H. V., as tenant of the said plaintiff, the Court of Common Pleas held, that it was sufficient to prove that the close was in the possession of H. V. *at the time of the injury committed*, though the tenant had been changed before the action was brought. (c)

Where the landlord had distrained his tenant's goods, and delivered them to A. upon A.'s undertaking to pay the rent, which he failed to do, it was held that the landlord could not maintain an action *for money had and received* against A. for the value of the goods. (d)

The landlord of a tenement in respect of which he claims a right of way over the lands of a stranger, does not lose or spend his right to use such way for proper purposes, by demising the premises and transferring the occupation of them to a tenant. Where, therefore, A. brought an action against B. for breaking and entering his close, and B. pleaded a right of way, and at the trial it appeared that the premises, in respect of which the right was claimed, were in the occupation of B.'s tenant, and that B. went over the *locus in quo* to assert the right of way which had been obstructed, the Court held that B. the landlord, might use the way to view the waste, to demand rent, or to remove an obstruction. (e)

II. The tenant's remedies against strangers.

II. The tenant's possessory interest enables him to maintain *trespass* against a stranger for any act by which his possession is immediately affected; or an action upon the case for the commission of any act, the consequences of which are injurious to his possession. (f)

(c) *Vowles v. Miller*, 3 Taunt. 687.
137.

(d) *Leery v. Goodson*, 4 T. R.

(e) *Proud v. Hollis*, 1 B. & C. 8.

(f) 2 Rol. Abr. sup.

It is said by Lord Coke (g) that for *waste* committed by a stranger, he in reversion cannot have any remedy but against the tenant, and that the tenant shall have his remedy against the wrong-doer, and recover all in damages against him, and by this means the loss shall light upon the wrong-doer. However, both lessor and lessee shall sue in respect of trees *injured* by a stranger, the lessor for the body of the tree, the lessee in respect of the shade and fruit. (h) So if a stranger subvert land leased at will, or for years, the lessee may bring trespass against him and have damages for the profits, and the lessor may have another action of trespass, and shall recover damages for the destruction of the land. (i)

Where a stranger enters and *cuts down trees*, the tenant may maintain trespass against him for the breaking of his close, and the cutting down of the trees. But since their severance puts an end to his interest in them, he cannot recover for the value of the trees, or maintain trespass, *de bonis asportatis*, or trover against the party for carrying them away. (k) The tenant *after* his term has expired, may maintain either case or trespass, according to the nature of the injury done to his possession, during the existence of his term. (l)

The damages to be recovered by the tenant must be proportioned to his temporary interest in the land. Where, however, the landlord demised lands at an annual rent for twenty-one years, with liberty to the lessee to dig half an acre of brick earth annually; and the lessee covenanted that he would dig no more; or, if he did, that he would pay an increased rent of 375*l.* *per* half acre, being after the same

(g) 2 Inst. 303.

(k) Harlakenden's case, 4 Rep.

(h) Biddlesford v. Onslow, 3 Lev. 209.

62. b. Evans v. Evans, 2 Camp. 191.

(i) 19 Hen. VI. 45. 2 Rol. Abr. 551, pl. 4, 5.

(l) Bro. Abr. *Trespass*, 456.

rate that the whole brick earth was sold for ; and a stranger having dug and carried away the brick earth, for which the lessee recovered against him the full value, without making any deduction for the interest of the landlord, the Court of Common Pleas held, that the lessee was entitled under the terms of his lease, to retain the whole damages. (*m*)

(*m*) *Attersoll v. Stevens*, *dissent*. Chambre, J., 1 Taunt. 183.

CHAPTER THE FOURTH.

Of Proceedings by a Stranger against Landlord or Tenant.

WHERE the landlord has made himself liable to repair the demised premises, and a stranger is injured by his neglect, he will be liable to a special action upon the case. (a) And if the landlord without cause, distrain the goods of a stranger, trover may be maintained against him; (b) or the stranger may replevy, and proceed in the same manner as the tenant.

1. Stranger's proceedings against landlord.

Since the tenant is *prima facie* liable to keep the premises in repair, an action on the case may be maintained against him for an injury which a stranger may sustain by his neglect. (c)

2. against tenant.

Where tenant for years erected a building, whereby the plaintiff's lights were stopped, for which obstruction the plaintiff recovered in an action, and then the tenant underleased the lands upon which the nuisance stood; it was holden that an action on the case might be maintained against the tenant for years, or his under-tenant, at the

(a) *Payne v. Rogers*, 2 H. Bl. T. R. 298.

350. *Lealie v. Pounds*, 4 Taunt. 649.

(c) *Cheetham v. Hampson*, 4 T. R. 318.

(b) *Shipwick v. Blanchard*, 6

plaintiff's election, notwithstanding the underlease, and the former recovery. (d)

If a stranger, whose goods are about to be distrained upon the tenant's premises, pay the rent, he may maintain an action against the tenant for money paid to his use. And where a stranger, to redeem his goods, which were distrained by the landlord, was compelled to pay the rent, it was held that he might maintain assumpsit for money paid to the use of the original lessees, who were bound by their covenants to the landlord, although some of them had, to the knowledge of the plaintiff, before he placed his goods on the premises, assigned their interest to one of their co-lessees, who was in the exclusive possession at the time. (e)

Ejectment
by stranger
against tenant.

Tenant bound
to give notice
to landlord.

11 Geo. II.
c. 19, s. 12.

When a stranger brings an ejectment against the tenant, his landlord may appear and be made defendant. (f) In one case, indeed, it was held that the landlord should be made defendant, *together with* the tenants in possession, and therefore if the tenants would not stand the suit, the landlord could not be let in. (g) The authority of that case was, however, questioned very soon after it was decided; (h) and all doubt has been since removed, for in order to prevent fraudulent recoveries of lands, and to prevent tenants from secreting declarations in ejectment from their landlords, it is enacted by statute 11 Geo. II. c. 19, s. 12. "That every tenant, to whom a declaration in ejectment shall be delivered, shall give notice thereof to his landlord, or his landlord's bailiff or receiver, under penalty of forfeiting the value of three years' improved or rack-rent of the premises so demised; to be recovered by action of debt; in which no es-

(d) *Rosewell v. Prior*, 2 Salk. 460. S. C. *Ld. Raym.* 713. 12 Mod. 635. title, *Burr.* 1290. S. C. *Bl. Rep.* 357.

(e) *Exall v. Partridge*, 8 T. R. 308. S. C. 3 Esp. 8. (g) *Goodright v. Hart*, 2 Strange, 830.

(f) *Fenwicke's case*, 1 Salk. 257. Fairclaim dem. *Fowler v. Sham-* (h) *Fowler v. Shamtitle*, cited *supra*.

soign, protection, or wager of law, shall be allowed, nor any more than one imparlance." And by section 13, the landlord is empowered to make himself defendant jointly with the tenant, in case the tenant appear ; or if the tenant suffer judgment by default, though judgment must be signed against the casual ejector, it shall be stayed, and the landlord alone let in to defend upon his application. and landlord may thereupon defend.

Where a demise was made of certain lands, with liberty to dig for certain ore, in adjacent mines, under lands not included in the demise ; and the tenant fraudulently concealed a declaration in ejectment, and suffered judgment by default ; and the sheriff, by the collusion of the tenant, delivered possession of the lands, and also of the mines, although the mines were not mentioned in the declaration ; it was held that the tenant was liable to treble the value of the rent of the premises, *and of the mines also* ; and that the tenant was estopped by his conduct from objecting that the mines could not be recovered under the declaration in ejectment. (i)

(i) Crocker v. Fothergill, 2 B. & A. 652.

CHAPTER THE FIFTH.

Criminal Responsibility of Landlord and Tenant.

THE landlord is answerable criminally for a forcible entry on the demised premises; as is the tenant for a forcible detainer of them.

If the landlord enters with a strong hand to dispossess the tenant by force, he may be indicted for a forcible entry. (a)

If the tenant keep possession by force of arms, or by intimidation, he will be guilty of a forcible detainer. (b)

7 & 8 Geo. IV.
c. 30.

Arson.

By the statute 7 & 8 Geo. IV. c. 30, s. 2, it is enacted, "That if *any person* shall unlawfully and maliciously set fire to any house, stable, coachhouse, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, or granary, or to any building, or erection, used in carrying on any trade or manufacture, or any branch thereof, whether the same, or any of them respectively, *shall then be in the possession of the offender*, or in the possession of any other person, with intent thereby to injure or defraud any person, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon."

By this statute, therefore, any omission in the common law or statute law, for the punishment of either owner or

(a) Taunton v. Costar, 7 Taunt. 432, *et vide* Bac. Abr. Forcible Entry. (B.) (b) Com. Dig. Forcible Entry. (B.)

tenant in possession, wilfully setting fire to the premises, has been supplied.

By the statute 7 & 8 Geo. IV. c. 29, s. 45, repealing the 3 William and Mary, c. 9, s. 5, it is enacted, "That if any person shall steal any chattel, or *fixture*, let to be used by him or her, in or with any *house or lodging*, whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her, or her husband, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and in every such case of stealing any chattel, it shall be lawful to prefer an indictment in the common form as for larceny, and in every such case of stealing any fixture, to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire."

By this latter statute, the party committing the felony, is punishable, whether he occupies the entire furnished house, or only part of it; and also for the subtraction of fixtures, as well as other goods.

By the act of the 1 & 2 Vict. c. 110, for abolishing arrest on mesne process, except in certain cases, and for extending the remedies of creditors against the property of debtors, and for amending the laws for the relief of insolvent debtors in England, the powers vested in the Court then established for the relief of insolvent debtors in England, are continued and vested in the Court, to be continued by virtue of that act; and by the 50th section the like provisions are made for the relief of the insolvent in respect of his liability to rent and the covenants in any lease, in case the assignees

elect to accept the same, and for empowering the lessor to apply to the Court in case the assignees decline to make their election as were inserted in the 7 Geo. IV. c. 56, before noticed. (a) But under neither statute does the lessee appear authorized to deliver up the lease in case the assignee refuse to accept it as provided for in the 6 Geo. IV. c. 16, relating to bankrupts. (b)

(a) *Supra*, p. 328.

(b) *Supra*, p. 302.

APPENDIX.

PRECEDENTS OF AGREEMENTS.

No. I.

Agreement for Lodgings.

MEMORANDUM of an agreement entered into this day of 1840, between *A. B.* of, &c. and *C. D.* of, &c. whereby the said *A. B.* agrees to let, and the said *C. D.* agrees to take, the rooms or apartments following: that is to say, [*describe the rooms*], with the use of the yard To hold the same, for the term of six calendar months certain, to commence from next after the date hereof, after the rate of yearly, payable quarterly, by equal portions: the first quarterly payment to be made on next ensuing the date hereof: and it is further agreed, that at the expiration of the said term of six calendar months, the said *C. D.* may hold and occupy the said rooms or apartments, and have the use of the said yard as aforesaid, from quarter to quarter, for so long a time as the said *C. D.* and *A. B.* may mutually agree, at the rent of for each quarter, and that each party be at liberty to quit possession, on giving to the other a quarter's notice in writing. And it is also further agreed between the said parties, that when the said *C. D.* shall quit the premises, he shall leave them in as good condition and repair as they shall be in on his taking possession thereof, reasonable wear excepted.

Witness.

A. B.

C. D.

Appendix.

No. II.

Agreement for ready furnished Lodgings.

MEMORANDUM of an agreement entered into this day of between *A. B.* of, &c. of the one part, and *C. D.* of, &c. of the other part, whereby the said *A. B.* agrees to let to the said *C. D.* [*describe the rooms*], ready furnished; together with the attendance of his servant, in common with the other lodgers and also the use of a cellar, at the rent of pounds *per* quarter. And the said *C. D.* agrees to take the said premises, at the rent aforesaid, and that if he shall break or damage any articles of the furniture of the said *A. B.*, he will make good or repair the same, or pay him sufficient to enable the said *A. B.* to put the same in the same plight and condition as they now are in. And it is further agreed, that if either party shall quit or leave the premises, he shall respectively give or take a month's notice in writing, to be computed from the date of the said notice.

Witness,

*A. B.**C. D.*

No. III.

Agreement for Lease of a Messuage and Land.

MEMORANDUM of an agreement entered into this day of 1840, between *A. B.*, of of the one part, and *C. D.* of of the other part, whereby the said *A. B.*, agrees by indenture to be executed on or before Michaelmas day next, to demise and let to the said *C. D.*, a messuage or tenement, with the garden and appurtenances thereto belonging, situate, lying, and being in in the parish of in the county of now or late in the occupation of together with all that field or close, situate, lying, and being in aforesaid, called or known by the name of

now or late in the occupation of _____, to hold to the said *C. D.*, his executors, administrators, and assigns, from Michaelmas day aforesaid, for and during the term of _____ years, at or under the clear yearly rent of _____ pounds, payable half-yearly, clear of all taxes and deductions except the land-tax. In which lease there shall be contained covenants on the part of the said *C. D.*, his executors, administrators, and assigns, to pay the rent, and to pay all taxes, rates, and assessments (except the land-tax,) to repair the premises (except damages by fire,) to deliver the same up at the end of the term in good repair (except as last aforesaid,) with all other usual and reasonable covenants, and a proviso, that in the event of the premises being destroyed or rendered uninhabitable by fire, the rent shall be suspended until they shall be again rebuilt, or rendered inhabitable, and a proviso for the re-entry of the said *C. D.* his heirs, or assigns, in case of non-payment of the rent for the space of _____ days after either of the said rent days, or the non-performance of the covenants. And there shall also be contained a covenant on the part of the said *A. B.*, his heirs and assigns, for quiet enjoyment. And the said *C. D.* hereby agrees to accept the said lease on the terms aforesaid. And it is mutually agreed, that in the mean time and until the said lease shall be executed, nothing herein contained shall be construed into a present or actual demise of the said premises, and that the cost of this agreement, and of making the said lease and a counterpart thereof, shall be borne by the said parties equally.

Witness.

A. B.

C. D.

No. IV.

Agreement for a Farming Lease.

MEMORANDUM of an agreement made this _____ day of _____ in the year _____ between *A. B.*, &c., of the one part, and *C. D.*, &c. of the other part, whereby it is agreed, that the said *A. B.* shall, on or before the 25th day of March

At a yearly rent.	now next ensuing, make and execute unto the said <i>C. D.</i> , his executors, administrators, and assigns, a good and valid lease of all that messuage, &c., and all those several closes, pieces, or parcels of land, &c., with the appurtenances thereunto belonging, for the term of years, from the said 25th day of March, at the yearly rent of pounds, payable half-yearly, clear of all deductions for taxes, or on any other account whatsoever (except the land-tax,) the first payment of the said rent to be made at Michaelmas day next, and at or under the further yearly rent of 5 <i>l.</i> for every acre, and so in proportion for a less quantity of meadow or pasture ground, which shall be ploughed or converted into tillage contrary to a covenant to be contained in the said lease, as hereinafter directed: the first payment of the last-mentioned rent to be made on the first half-yearly rent-day after such ploughing and conversion into tillage as aforesaid; and in the said lease there shall be contained covenants on the part of the said <i>C. D.</i> , his executors, administrators, and assigns, to pay the aforesaid rents, and to pay all taxes, rates, and assessments (except the land-tax,)—for doing all manner of repairs to the said buildings, hedges, ditches, rails, and other fences, (the said <i>A. B.</i> , his heirs or assigns, providing upon the premises, or within miles thereof, rough timber, bricks, tiles, and lime, for the doing thereof, to be conveyed by the said <i>C. D.</i> , his executors, administrators, or assigns)—for permission for the said <i>A. B.</i> , his heirs or assigns, at all seasonable times, to view the state of repairs, That the said <i>C. D.</i> , his executors, administrators, or assigns, shall not plough or convert into tillage any of the closes of meadow or pasture ground without the licence of the said <i>A. B.</i> , his heirs or assigns, in writing first obtained. That the said <i>C. D.</i> , his executors or administrators, shall not carry off from the farm any hay, straw, or other fodder, and that the said <i>C. D.</i> , his executors, administrators, or assigns, shall spread on some part of the said lands in an husbandlike manner, all the dung, manure, and compost, which shall arise from the said farm, and shall in all respects manage and cultivate the same in an husbandlike manner, and according to the usual course of husbandry uses in the neighbourhood, and shall leave all the dung, manure, and compost of the last year, for the use of the landlord or succeeding tenants. That the said <i>C. D.</i> , his executors, administrators, or assigns, shall not cut or plash any of the quick
And a further rent per acre for ploughing.	
The lease to contain covenants on the part of the tenant.	
To pay rent and taxes.	
For repairing (landlord finding timber, &c.)	
For permission to view state of repairs.	
Not to plough meadow,	
Not to carry off fodder, &c.	
To spread dung on the premises.	
And manage same in an husbandlike manner.	
To leave dung of last year.	
Not to cut hedges under certain growth.	

hedges under years' growth, and shall cut or plash
 those at seasonable times in the year, and at the time of doing
 thereof shall cleanse the ditches adjoining thereto, and guard To cleanse
ditches, &c.
 and preserve the hedges, which shall be so cut and plashed as
 aforesaid, from destruction or injury by cattle, and shall also at
 all times guard and preserve all young hedges and young trees
 from the like destruction or injury. That the said *C. D.*, his
 executors, administrators, or assigns, shall, in the summer im-
 mediately preceding the determination of the said term to be To prepare fal-
low lands at the
end of the term
for a crop.
 granted as aforesaid, prepare for seed in an husbandlike manner
 such part of the land as shall be in a course of fallow, and fit
 to be sown with a crop the ensuing season, and lay down with
 clover seed and rye-grass acres of the arable land To lay down
part with
clover, &c.
 which shall be then in tillage, sowing upon each acre thereof
 pounds of the best clover-seed and bushels
 of the best rye-grass seed. And in the said lease there shall Lease to con-
tain a proviso
for re-entry.
 be contained a proviso for re-entry by the said *A. B.*, his heirs
 or assigns, in case of non-payment of rent for the space of
 days, or non-performance of the covenants, or in case
 the said *C. D.*, his executors, administrators, or assigns, shall
 assign, underlet, or otherwise dispose of the said premises, or
 any part thereof, or do commit or suffer any act or deed
 whereby, or by means whereof the said premises, or any part
 thereof, shall be assigned, under-let, or disposed of, without
 the consent in writing of the said *A. B.*, his heirs or assigns,
 first obtained. And there shall be contained covenants on the And covenants
on the part of
the landlord for
quiet enjoy-
ment.
 part of the said *A. B.*, his heirs and assigns, for quiet enjoy-
 ment.—That the said *A. B.*, his heirs or assigns, shall, upon
 days' notice, provide and allow to the said *C. D.*, his
 executors, administrators, and assigns, upon the premises, or To provide
timber, &c. for
repairs.
 within miles thereof, all such rough timber, bricks,
 tiles, and lime, as shall be necessary for the repair of the pre-
 mises: the said materials to be conveyed at the expense of the
 said *C. D.*, his executors, administrators, and assigns.—That To permit te-
nant to have
the use of the
barn, &c. at
the end of the
term.
 the said *A. B.*, his heirs and assigns, shall permit the said *C. D.*
 his executors, administrators, or assigns, to have the use of the
 great barn, the stable for four horses adjoining, and the stack-
 yard and farm-yard, until after the expiration or deter-
 mination of the said term, for the convenience of thrashing out
 the last year's crops of corn and grain, and feeding his or their
 cattle with the straw and fodder, so that the same may be made

into manure to be left on the said premises as aforesaid; and also some convenient room in the farm-house for his or their servants to lodge and diet in, until the time aforesaid, without any recompence being made for the same respectively.

Witness.

A. B.

C. D.

No. V.

Short agreement for a farming Lease.

MEMORANDUM between *A. B.* of, &c. of the one part, and *C. D.* of, &c., of the other part. The said *A. B.* doth hereby, for himself, his heirs, and assigns, agree with the said *C. D.*, his executors and administrators, in manner following: that is to say, that he, the said *A. B.*, his heirs or assigns, or some or one of them, shall and will on or before the day of now next ensuing the date hereof, make, execute, and deliver, and the said *C. D.* doth hereby for himself, his executors and administrators, promise and agree to and with the said *A. B.*, his heirs and assigns, to accept and take a good and effectual indenture of lease, to be prepared by the said *A. B.*, his heirs or assigns, at the costs and charges of the said *C. D.*, his executors or administrators, of all that messuage, farm, and hereditaments, called or known by the name of, &c., situate at, &c. with the appurtenants for the term of years, to be computed from the said day of at the yearly rent of 4. And it is hereby further agreed and declared between and by the said parties, that there shall be contained in the said intended indenture of lease all such covenants, provisoes, and conditions as are reasonable and usual in leases of premises of a like nature in the neighbourhood or country where the said farm and hereditaments are situate; and that in the meantime, and until the said indenture of lease shall be executed, nothing in these articles contained shall be construed into a present or actual demise of the said farm and premises.

And the said *C. D.* doth hereby for himself, his executors

and administrators, promise and agree to and with the said *A. B.*, his heirs and assigns, that he or they, or some or one of them, shall and will execute and deliver to the said *A. B.*, his heirs or assigns, a counterpart of the said intended indenture at the same time that the said *A. B.*, his heirs or assigns, shall execute and deliver unto the said *C. D.*, his executors or administrators, such intended indenture of lease as aforesaid.

Witness.

A. B.

C. D.

No. VI.

Memorandum of Agreement for Lease of Copyholds.

MEMORANDUM, &c.

The said *A. B.* agrees to grant, and the said *C. D.* agrees to take, a good and effectual demise by indenture of all that, &c. [*describe the premises*] for the term of years, at the yearly rent, &c., and under and subject to the usual covenants, conditions, and provisions contained in leases of a like nature, if the lord of the manor in which the same lands and hereditaments are situate shall grant his license, [*or "if according to the custom of the said manor, the said premises may be so demised without incurring a forfeiture."*] And the said *A. B.* doth hereby for himself, his heirs and assigns, promise and agree to and with the said *C. D.*, his executors and administrators, to use his utmost endeavour to procure from the lord of the said manor a proper and sufficient license and consent for the granting and demising the said premises for the term hereinbefore mentioned. Provided always, and it is hereby expressly agreed and declared, that in case the said *A. B.*, his heirs and assigns, shall not be able to obtain the licence or consent of the lord of the said manor to demise the said lands and premises in the manner hereinbefore mentioned, then and in such case this present memorandum shall be void and of none effect as far as relates to the granting or demising of the said

term of years hereinbefore mentioned; but that, nevertheless, it shall be in that case construed to be an agreement for the demise by indenture of the said premises for the term of one year and for one year only, or for such other longer term for which the same may be lawfully granted, according to the custom of the said manor, at and under the yearly rent and covenants hereinbefore mentioned, with a covenant in the said indenture of lease to be contained on the part of the said *A. B.*, his heirs and assigns, that he and they shall and will permit and suffer the said lessee, his executors, administrators, and assigns, to have, hold, and quietly enjoy the said premises from year to year, or for such longer successive terms as the custom of the said manor may permit, until the full end and term of years hereinbefore agreed to be granted as aforesaid.

Witness.

A. B.

C. D.

No. VII.

Agreement to Let a Furnished House from Year to Year.

Parties.
Letting from
year to year.

Rent payable
half-yearly.

Tenant to hold
furniture while
he occupies
house.

MEMORANDUM between *A. B.* of, &c. of the one part, and *C. D.* of, &c. of the other part. The said *A. B.* hereby agrees to let, and the said *C. D.* hereby agrees to take, all that messuage or tenement, &c. for one whole year, from the day of instant, and so on from year to year, so long as this agreement shall continue in force, determinable by either of the said parties giving, either in the first or any subsequent year, to the other of them three calendar months' notice in writing for that purpose, at the yearly rent of *l.*, payable by equal half-yearly payments, on the day of and the day of in each year, without deduction: and it is agreed that the said *C. D.* shall and may hold, use, and enjoy in and upon the said messuage and premises, the furniture and other the effects specified in the schedule here underwritten, during such time as the said *C. D.* shall continue to occupy the said pre-

mises under this agreement: and that he, the said *C. D.*, his executors or administrators, shall pay to the said *A. B.* for the use of the said furniture, the annual sum, in addition to the said yearly rent of £., by half-yearly payments on the days and times appointed for the payment of the said rent of £. clear of all deductions: and the said *C. D.* hereby agrees, during the time he shall occupy the said messuage and premises under this agreement, well and substantially to repair and keep repaired, at his or their own expense, all the glass and other windows, window shutters, locks, fastenings, bells, and all other fixtures, in, upon, and belonging to the said premises, and leave the same in such good repair at the time of quitting the occupation of the said premises: and not wilfully injure any of the said furniture and effects, or use them as furniture for or in any other house than the said messuage: and so far as circumstances will permit (reasonable wear and tear only excepted) to keep and preserve the same in the like state and condition as at present: and supply and make good (by replacing articles of the same sort and value) all such articles of furniture and effects as shall be broken or destroyed: and on quitting the said premises, to deliver up to the said *A. B.*, or leave in or upon the said messuage or premises, all the said furniture and other effects, in such state and condition as aforesaid, except such articles as shall be broken or destroyed as aforesaid, and in lieu thereof all such articles as shall have been substituted as aforesaid.

Tenant to pay an additional rent for furniture.

Agreement by tenant to repair windows, &c.

Not to injure furniture, or use same in any other house; and preserve same in such condition as at present, and make good broken articles. At quitting deliver to landlord furniture in such condition as aforesaid, with articles substituted as aforesaid.

Witness.

A. B.

C. D.

The schedule to which the above-written memorandum of agreement refers.



Appendix.

No. VIII.

Agreement for a Letting for one Year certain, and so on from Year to Year.

MEMORANDUM, &c., between *A. B.* and *C. D.* The said *A. B.* agrees to let to the said *C. D.*, and the said *C. D.* agrees to take, all that messuage for one year certain, and for one year only, from the date hereof; and after the expiration of such one year, for such longer time as both parties shall agree on, or until the expiration of three months after notice to quit shall at any time be given by either of the said parties to the other of them, at the yearly rent or sum of £., or a proportionate part thereof, for any time less than a year that the said *C. D.* shall occupy the said premises after the expiration of the said first year.

Witness.

*A. B.**C. D.*

LEASES.

No. I.

Lease of a Messuage in London.

THIS INDENTURE, &c. made, &c. witnesseth that in consideration of the rent, covenants, agreements herewith contained, and on the part of the said *C. D.*, his executor, administrators, and assigns, to be paid, observed, and performed, he the said *A. B.* hath demised and leased, and by these presents doth demise and lease unto the said *C. D.*, his executors, administrators, and assigns, all that messuage, &c., with all ways, passages, lights, casements, rooms, vaults, cellars, areas, yards, water-courses, profits, conveniences, here-

General words.

ditaments, and appurtenances, whatsoever, to the said messuage or premises hereby demised, belonging or in any way appertaining, or reputed or known to be part, parcel, or member thereof: all and singular which said messuage and premises are now, or lately were, in the occupation of *E. F.*, his assignee or assigns, to *have and to hold* the said messuage or tenement and premises, with the appurtenances hereby demised unto the said *C. D.*, his executors, administrators, and assigns, from the 25th day of December last past, for and during the term of twenty-one years, thence next ensuing, and fully to be complete and ended, determinable nevertheless at the expiration of the first seven or fourteen years thereof, upon such conditions as are hereinafter mentioned: he the said *C. D.*, his executors, administrators, and assigns, yielding and paying yearly and every year during the said term, the yearly rent or sum of pounds, of lawful money of Great Britain, the same to be paid by equal quarterly payments on the respective days following: namely, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, in every year, (save and except, at all times during the said term, such proportionable part of the said yearly rent of pounds as shall or may grow due during such time, as the messuage or tenement hereby demised shall without the hindrance of the said *C. D.*, his executors, &c. be and remain uninhabitable by reason of accidental fire) and to be clear of all and all manner of parliamentary, parochial, and other taxes, assessments, rates, and deductions whatsoever; the first quarterly payment thereof to commence and be made on the 24th day of June next ensuing the date of these presents. And the said *C. D.* doth hereby for himself, his executors, &c. covenant, promise and agree to and with the said *A. B.*, his executors, &c. that he the said *C. D.*, his executors, &c. shall and will yearly and every year during the continuance of the said term hereby demised (save and except as aforesaid,) well and truly pay, or cause to be paid unto the said *A. B.*, his executors, &c. the said yearly sum or rent of pounds, on the respective days, and in the manner on and in which the same is hereinbefore made payable. And also shall and will, well, and truly pay, or cause to be paid, all and all manner of taxes, assessments, rates, and impositions whatsoever, parliamentary,

Habendum for
21 years.

Determinable
at the end of
seven or four-
teen years.

At the rent of,
&c.

Exception as to
fire.

Covenant to
pay rent.

And taxes (ex-
cept land-tax.)

Covenant that
lessee shall
paint every
third year.
And do other
repairs.

Power to lessor
to view the
state of the
repairs.

After notice.

Covenant by
lessee to repair.

parochial or otherwise, (the land-tax only excepted,) which now are, or shall at any time during the continuance of the said term hereby demised, be assessed, rated, or imposed on the said demised messuage or tenement, and premises, or any part thereof, or on the said yearly rent hereby reserved, or any part thereof, or on the said *C. D.*, his executors, &c. on account thereof. And also that he the said *C. D.*, his executors, &c. shall and will at his and their own proper costs and charges, cause to be well and sufficiently painted, all the outside wood and iron work belonging to the said messuage or tenement and premises hereby demised, every third year during the continuance of the said term, and at his and their like proper costs and charges, shall and will at all times during the continuance of the said term, keep in a good, sufficient, and tenantable state of repair, as well all and singular the glass and other windows, wainscots, rooms, floors, partitions, ceilings, tilings, walls, rails, fences, pavements, grates, sinks, privies, drains, wells, and water-courses, as also all and every other the parts and appurtenances of the said messuage or tenement and premises hereby demised, (damage happening by casual fire only excepted.) And further, that it shall be lawful for the said *A. B.*, his executors, &c. either alone or with others, twice in every year during the said term hereby granted, at such times of the year as to him or them shall seem meet, to enter at seasonable times of the day into and upon the said messuage or tenement and premises hereby demised and every part thereof, and there to view and examine the state and condition thereof, notice of such intention to view being at all times previously given unto the said *C. D.*, his executors, &c. one day at least before the same shall take place; and in case any decay or want of reparation be found on such view, the said *C. D.* for himself, executors, &c. doth hereby covenant, promise, and agree, to and with the said *A. B.*, his executors, &c. to cause the same to be well and sufficiently repaired and amended within the space of six months after notice thereof in writing shall have been given to him or them for that purpose. And the said *C. D.* doth for himself, his executors, &c. promise, covenant, and agree, to and with the said *A. B.*, his executors, &c. that he the said *C. D.*, his executors, &c. shall not, nor will, at any time during the continuance of the term hereby granted, use or carry on, or suffer and permit to be used and carried on, in the said demised

messuage or tenement and premises, or assign over the present indenture of lease, or set over, let, or assign any part of the said messuage or tenement and premises, to any person or persons using or carrying on the trade, business, or calling of a maker of sedan or other chairs, baker, brewer, butcher, currier, distiller, dyer, founder, smith, soap-boiler, school-master, or school-mistress, sugar-baker, auctioneer, pewterer, tallow-chandler, or tallow-melter, working brazier, tinman, tripe-boiler, pipe-maker, pipe-borer, plumber, keeper of a mad-house or lunatic asylum, or any other noxious and offensive trade, business, or calling whatsoever, without the consent in writing of the said *A. B.*, his executors, &c. first had and obtained for that purpose. And the said *C. D.* doth for himself, his executors, &c. further promise, covenant, and agree to and with the said *A. B.*, his executors, &c. at the end or earlier determination of the said term hereby granted, shall and will leave and yield up unto the said *A. B.*, his executors, &c. all and singular the said messuage or tenement and premises with their appurtenances, in such good, sufficient, and tenantable state of repair as aforesaid, together with all and every the doors, locks, keys, bolts, bars, chimney-pieces, dressers, shelves, water-pipes, and other things mentioned in an inventory or schedule, (a) here-under written or hereunto annexed, in as good plight and condition as the same now are, (reasonable use and wear thereof and casualties happening by fire only excepted.) Provided always, and these presents are upon this express condition, that if the said yearly rent hereby reserved, or any part thereof, shall be in arrear and unpaid for the space of days next after any of the days whereon the same is hereinbefore covenanted to be paid as aforesaid, (being first lawfully demanded,) or if the said *C. D.*, his executors, &c. shall not well and truly observe, and keep, according to their true intent and meaning, all and every the covenants, clauses, provisoes and agreements hereinbefore contained and by him and them to be observed and kept, then and from thenceforth in any of the said cases it shall be lawful for the said *A. B.*, his executors, &c. to re-enter into and upon the said hereby demised messuage or tene-

Covenant
against carry-
ing on trades.

Covenant by
lessee to quit
possession.

Proviso for
lessor to re-
enter.

(a) This inventory, if distinct from the lease, must be stamped, 55 Geo. III. c. 184.

Covenant that
lessee shall
quietly enjoy
the premises.

Indemnified
against rent,
&c. in original
lease.

Covenant for
renewal.

ment and premises, or any part thereof, in the name of the whole, and the same to have again, repossess, retain, and enjoy, as his and their former estate, and the said *C. D.*, his executors, &c. and all other tenants and occupiers of the said premises, thereout utterly to eject and remove, and that from and after such re-entry made, this lease and every clause and thing herein contained, shall determine, and be utterly void to all intents and purposes, any thing herein contained to the contrary notwithstanding. And the said *A. B.* for himself, his executors, &c. doth covenant, promise, and agree, to and with the said *C. D.*, his executors, &c. by these presents, in manner following, that is to say, that he the said *C. D.*, his executors, &c. paying the rent hereby reserved in manner aforesaid, and performing the covenants and agreements herein contained and by him and them to be performed, shall and lawfully may peaceably and quietly hold, occupy, and enjoy the messuage or tenement, and all other the premises hereby demised, for and during the said term of twenty-one years hereby granted, without any lawful action, suit, or interruption of the said *A. B.*, his executors, &c. or any other person lawfully claiming by, from, or under him or any of them; and that freed and discharged, or otherwise by the said *A. B.*, his executors, &c. saved harmless and indemnified from the rents and covenants reserved and contained in a certain indenture of lease, bearing date the day of in the year of our Lord whereby the said *A. B.* holdeth the said messuage or tenement and premises hereby demised, from the date hereof for the term of sixty-one years, and from all claims and demands whatsoever in respect thereof. And the said *A. B.* doth hereby further covenant, promise and agree to and with the said *C. D.*, his executors, &c. that the said *A. B.*, his executors, &c. shall and will, before the expiration of this present lease, on the request, and at the costs and charges of the said *C. D.*, his executors, &c. grant and execute unto him and them a new and fresh lease of the messuage or tenement, and all other the premises hereby demised, with their appurtenances, for the further term of years, to commence from the expiration of the term hereby granted, the same to be at the same yearly rent, payable in like manner, and under and subject to the like covenants, provisoes, and agreements, (except a covenant for the renewal thereof at the end

of such further term,) as are contained in these presents, such new lease to be granted on condition that the said *C. D.*, his executors, &c. do execute a counterpart thereof, and pay unto the said *A. B.*, his executors, &c. the sum of pounds of lawful money, &c. at the time of executing the said lease, as and by way of fine or premium for the renewal thereof. And also, that if the said *C. D.*, his executors, &c. shall be desirous to quit the said messuage or tenement and premises hereby demised, at the expiration of the first seven or the first fourteen years of the term of twenty-one years hereby granted; and of such his or their desire, shall give notice in writing to the said *A. B.*, his executors, &c. six calendar months before the expiration of the said first seven or fourteen years, (as the case may be,) then and in such case, (all arrears of rent being duly paid, and the said messuage or tenement, and all other the premises hereby demised, being in such repair as they are hereinbefore covenanted to be maintained and left in,) this lease and every clause and thing herein contained, shall, at the expiration of such first seven or first fourteen years of the said term of twenty-one years hereby granted, (whichever be in the said notice expressed,) determine and be utterly void to all intents and purposes, in like manner as if the whole term of twenty-one years had run out and expired, any thing in these presents contained to the contrary notwithstanding. In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

And for determining the present lease at seven or fourteen years' end at the lessee's option.

A. B. (L. S.)

C. D. (L. S.)

Sealed and delivered (being first duly stamped)

in the presence of

G. H. of

E. F. of

No. II.

Farming Lease.

The premises,
date, parties,
&c.

Demise.

Exceptions.

THIS INDENTURE, made, &c., between *A. B.* of the one part, and *C. D.* of the other part, witnesseth, that in consideration of the rents, covenants, and agreements hereinafter reserved and contained, and on the part of the said *C. D.*, his executors, administrators, and assigns, to be paid, observed, and performed, he the said *A. B.* hath demised and leased, and by these presents doth demise and lease unto the said *C. D.*, his executors, administrators, and assigns, all that farm-house called _____ situate, &c., with the barns, stables, dove-cote, and other out-buildings, yards, gardens, and orchards thereto belonging; and all the several pieces or parcels of arable land, meadow, pasture, and marsh ground therewith occupied containing altogether by estimation _____ acres, (be the same more or less,) now in the tenure and occupation of _____, and all ways, lights, easements, waters, watercourses, commons, common of pasture, common of turbary, profits, commodities, hereditaments, and appurtenances whatsoever to the said farm-house, lands, and premises belonging, or in any wise appertaining, (except and always reserved unto the said *A. B.*, his heirs and assigns, all and all manner of woods, groves, coppices, and springs, and all trees of oak, ash, elm, and all other timber, and timber-like trees whatsoever (*a*); and the branches, and sheds, tops, and lops of the same; and all fruit-trees, but not the fruit thereof; and all pollards, and willows, and all other trees whatsoever, and all the underwoods, thorns, bushes, and quicksets, in, upon, or about the said premises, but not including the lops and tops of pollards, stubbs, and surplus thorns, required for firing, which may be taken by the said *C. D.*, his executors, administrators, and assigns, and also excepting out of this present demise all the

(*a*) The lessee is not, it seems, liable in trespass if his cattle bark the excepted trees. See *Glenham v. Hanby*, 1 Ld. Raym. 739. *Clithero v. Higga*, Sir W. Jones, 388.

reeds in the marshes now standing and growing, or being, or which at any time or times hereafter during the continuance of this demise, shall stand, grow, or be upon the said premises or any part thereof; and also all mines and quarries in, under, and upon the same premises; and also, all such marle, clay, chalk, brick-earth, gravel, sand, stones, and other materials, which now are, or hereafter during the continuance of this demise shall be under or upon the same premises, or any part or parts thereof, as the said *A. B.*, his heirs and assigns may choose to have and carry away with free liberty of ingress, egress, and regress to and for the said *A. B.*, his heirs and assigns, his and their agents, servants, and workmen at seasonable times in the year, during the continuance of this demise, with or without horses, carts, carriages, and all other necessary things into, upon, from, and out of all or any part or parts of the premises hereinbefore demised, to view, fell, and cut down, hew, grub up, cut, saw, convert, dig for, and carry away the said excepted woods, trees, minerals, and other things respectively, or any part or parts thereof respectively; and also to graft, and plant, and transplant trees, and sow tree-seeds in or near the hedgerows, borders, and waste places, and in the woods, groves, coppices, and springs of or belonging to the said premises, and to fence about and preserve the same from injury (b) by cattle or otherwise, at his and their free will and pleasure, thereby doing as little damage as possible to the said *C. D.*, his executors, administrators, or assigns. And also except and always reserved unto the said *A. B.* and his assigns, and other the person or persons aforesaid, all manner of game, fish, and wild fowl, with free liberty for him and them, and his and their servants and friends at all seasonable times, to hunt, hawk, fish, fowl, set, course, shoot, and sport upon or over the said premises hereinbefore demised, or any part or parts thereof. And full and free liberty of ingress, egress, or regress to and for him and them, and his and their agents, servants, and workmen, at all reasonable times in the year, into, upon, from, and out of all or any part or parts of the said premises, to view the state and condition of the buildings thereon, and to pull down, rebuild, alter, and repair

(b) The lessee is not, it seems, bound to preserve the excepted trees from his cattle by fencing; vide 690, note.

Habendum et

the houses and buildings thereon, or any of them, at his or their pleasure, and also to view the state and condition of the repairs hereinafter covenanted to be done by the said *C. D.*, his executors, administrators, and assigns, and to give notice in writing to the said *C. D.*, his executors, administrators, and assigns, for doing such repairs as shall from time to time be necessary and proper to be done; and also to bring, carry, lay, make, and repair all the materials and things necessary and proper to be used in or about the pulling down, rebuilding, altering, or repairing the said house, buildings, and premises, or any part or parts thereof, thereby doing as little damage as may be to the said *C. D.*, his executors, administrators, and assigns; and also except and reserved unto the said *A. B.*, his heirs and assigns, free liberty for him and them, and his and their succeeding tenant or tenants of the said premises hereinbefore demised, and their or any of their servants and workmen, with horses and all necessary implements of husbandry in due season in the last year of this demise, to enter into and upon so much of the arable lands hereinbefore demised, as shall be then sown with summer corn, there to sow clover or other grass seeds with such summer corn, and to harrow and roll in the same; and also except and reserved unto the said *A. B.*, his heirs and assigns, convenient lodging room for his or their servants and workmen, and convenient stable room for his or their horses, and for hay, straw, and provender for such horses during the time of such horses and workmen being employed in sowing the said clover and other grass seeds, and in harrowing and rolling in the same; and also free liberty of ingress and regress for him and them, and his and their servants and workmen with horses and carriages, or otherwise, to come, go, pass, and repass into, over, upon, and from the said premises, or any of them, or any part or parts thereof, at all reasonable times, for any reasonable cause or thing whatsoever.) To have and to hold the said farmhouse, pieces, or parcels of land, and all and singular other the premises hereinbefore demised or expressed, and intended so to be, (except as hereinbefore is excepted and reserved,) with their appurtenances, unto the said *C. D.*, his executors, administrators, and assigns, for the term of twenty-one years, to be computed from the day of now last past,

and thenceforth next ensuing, and fully to be complete and ended; yielding and paying, therefore, yearly and every year during the said term of twenty-one years, the yearly rent of £. of lawful money of Great Britain, by equal quarterly payments on the day of ; the day of ; the day of ; and the day of in each and every year, without any deduction or abatement whatsoever for or in respect of the land-tax or any other present or future taxes, charges, rates, impositions, or assessments, or any other matter, cause, or thing whatsoever; and the first quarterly payment of the said yearly rent to be made on the day of next ensuing the day of the date of these presents; and also yielding and paying yearly and every year during the said term the additional yearly rent or sum of 10%. for every acre, and so in proportion for any greater or less quantity than an acre of the said premises hereinbefore demised, which shall be ploughed, dug, broken up, or converted into tillage or garden ground contrary to and in breach of the covenant hereinafter contained; the said further rent of 10%. to be paid on the last day of payment in every year in which the same shall happen to become payable without any deduction or abatement whatsoever. Provided always, and these presents are upon this express condition, that if the said yearly rent or sum of £. or the said additional rent hereinbefore reserved, or either of them, or any part thereof respectively, shall be in arrear by the space of twenty days next after the same respectively ought to have been paid as aforesaid, being lawfully demanded by the said *A. B.*, his heirs, executors, administrators, or assigns, or if the said *C. D.*, his executors, administrators, or assigns, shall at any time or times during the continuance of this demise, transfer, assign over, or underlet, or attempt or agree to transfer, assign over, or underlet to any person or persons whomsoever, the said premises hereinbefore demised, or any part or parts thereof, for all or any part of the said term of twenty-one years, without the license or consent in writing of the said *A. B.*, his heirs or assigns for that purpose first had and obtained; or if the said *C. D.*, his executors, administrators, or assigns, shall become bankrupt, or take the benefit of any act or acts, passed or to be passed for the relief of insolvent debtors, or

Reddendum.

Conditions for
re-entry in case
of rent-arrearor of lessee's
assigning,or becoming
bankrupt,

or breach of
covenant.

Covenants by
the lessee,

to pay rent,

shall compound his or their debts, or assign over his or their estates and effects for payment thereof, or if any execution shall issue against him or his effects whereupon the said premises or any part thereof shall be taken or attempted to be taken in execution; or if the said *C. D.*, his executors, administrators, or assigns shall not from time to time, and at all times during the continuance of this demise, well and truly observe, perform, fulfil, and keep all and singular the covenants, conditions, and agreements, which on his or their parts are or ought to be observed, performed, fulfilled, and kept according to the true intent and meaning of these presents, then in any and every such case, and although no advantage shall have been taken of any previous default, it shall and may be lawful to and for the said *A. B.*, his heirs and assigns, into and upon the said premises hereinbefore demised, or any part thereof in the name of the whole wholly to re-enter, and the same to have again, repossess, and enjoy as his or their former estate, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding. And the said *C. D.* doth for himself, his heirs, executors, administrators, and assigns covenant, promise, and agree with and to the said *A. B.*, his heirs and assigns, in manner following, (that is to say) that he the said *C. D.*, his executors, administrators, or assigns, or some or one of them shall and will well and truly pay or cause to be paid unto the said *A. B.*, his heirs or assigns, the said yearly rent or sum of *l.* and the said additional rent hereinbefore reserved and made payable on or at such days or times and in such manner as hereinbefore mentioned and appointed for payment of the same respectively, according to the true intent and meaning of these presents. And also shall and will well and truly pay, bear and discharge the land-tax and all other taxes, charges, rates, duties, and assessments whatsoever, either already taxed, charged, rated, assessed, or imposed, or at any time or times hereafter during the continuance of this demise to be taxed, charged, rated, assessed, or imposed upon the said yearly rent of *l.* or upon the said additional yearly rent or upon the said premises hereby demised, or any of them, or any part or parts thereof, or upon the said *A. B.* or his heirs or assigns, or other the person or persons aforesaid, as landlord or landlords of the same premises, by authority of parliament or otherwise

howsoever ; and also shall and will at all times hereafter during the continuance of this demise allow and deliver or cause to be delivered unto the said *A. B.* and his assigns or other the person or persons aforesaid at his or their residence at aforesaid, one-half of the pigeons which shall from time to time be killed from the dovecote upon the said premises ; and also shall and will yearly and every year during the continuance of this demise at his or their own costs and charges perform successive days carriage work with a waggon and team of three horses and a servant for the said *A. B.*, his heirs and assigns, he or they giving to the said *C. D.*, his executors, administrators, or assigns, three days' previous notice of the time and place when and where the same work is to be done ; but nevertheless the said waggon shall not be compelled to go to any greater distance than seven miles from the farm-house hereinbefore demised. And also shall and will at all times during the continuance of this demise when need or occasion shall be or require, and whether any notice shall be given for the reparation of the same or not, at his and their own proper costs and charges well and substantially uphold, repair, maintain, sustain, and amend all the glass windows and glazings of the said messuage or tenement, and farm-house hereby demised, and all the locks, keys, hinges, bolts, bars, fixtures, pumps, and the going-gears thereof, gates, gate-irons, stiles, pales, posts, rails, battens, bridges, hedges, ditches, drains, intercourses, and inward and outward fences of every kind, of or belonging to the said premises hereinbefore demised, or any part or parts thereof, (such allowance of rough timber and fencing stuff being from time to time made to him and them as is hereinafter covenanted to be made,) and the same articles and things being well and sufficiently upholden, repaired, supported, maintained, sustained, and amended as aforesaid, shall and will peaceably and quietly leave, surrender, and yield up the said messuage and premises hereinbefore demised with the same, unto the said *A. B.*, his heirs or assigns, person or persons for the time being entitled as aforesaid at the end or sooner determination of this present demise, together with all such fixtures, materials, and things as now are or shall at any time or times during the continuance of this demise be set and affixed within, upon, or about the said

to deliver
pigeons,

and perform
carriage work.

To repair.

To yield up
possessions.

To provide
straw, &c.

To carry
materials.

And provide
beer for work-
men.

Not to assign.

Not to plough
pastures.

Or mow during
the last three
years.

To cultivate
the lands.

premises hereinbefore demised or any part or parts thereof, (reasonable use thereof, and accidents by fire only excepted.) And also that he or they shall and will find and provide good winter corn and straw sufficient for thatching and daubing all or any of the said buildings and premises hereby demised or any part or parts thereof without any allowance being made to him or them, in respect of the same.—And also shall and will, at his and their own costs and charges, fetch and carry all the materials which shall be wanted to repair any of the buildings and premises hereinbefore demised, and lay the same in convenient places for use, provided the carriage thereof does not exceed the distance of ten miles from the said farm-house.—And also, shall and will find and provide the workmen with good and wholesome beer, according to the custom of the country, during the time in which any such repairs shall be doing without any allowance being made to him or them in respect of the same.—And also, that he the said *C. D.*, his executors, administrators, or assigns, or any of them, shall not nor will at any time or times, during the continuance of this demise, transfer, assign over, or underlet to any person or persons whomsoever the said premises hereinbefore demised, or any part or parts thereof, for all or any part of the said term of twenty-one years, without the licence and consent in writing of the said *A. B.*, his heirs or assigns, for that purpose first had and obtained.—And also, that the said *C. D.*, his executors, administrators, or assigns, shall not nor will at any time or times, during the continuance of this demise, plough, dig, break up, or convert into tillage or garden-ground, any of the fields, closes, pieces, or parcels of pasture or meadow-land, hereinbefore demised, or any part or parts thereof respectively. —And also, shall not nor will, during the last three years of this demise, mow, or cause, or suffer to be mowed, the fields, closes, pieces, or parcels of land, hereinbefore demised, or any of them, or any part or parts thereof respectively, more than once a year, or during the continuance of this demise, permit the same to be trodden down and damaged by heavy cattle.—And also, shall and will at all times during the continuance of this demise so manage and cultivate the arable lands, parcel of the said premises hereinbefore demised, that no more than two successive crops of corn, pulse, or grain (and those

two not of the same kind) shall be grown upon, or had or taken from off the same or any part or parts thereof, without giving the same a clear summer fallow, and sowing the same with turnips in the ensuing year; and for the next crop after such turnips, laying down the same land in an husbandlike manner with a sufficient quantity of sound clover and other grass seeds, and continuing the same two years to be accounted and computed from the Midsummer-day next after sowing the same seeds.—And also, shall and will yearly and every year during the said term inbarn or stack up on the said premises all the corn or grain which shall arise or grow therefrom, and there thresh the same and spend and consume on the said premises by feeding and foddering cattle therewith or otherwise all the straw, colder, chaff, and clover, arising therefrom; and also all the hay or turnips that shall grow or arise from or upon the said premises hereinbefore demised, except the winter corn-straw, that shall be wanted for thatching and daubing work; and also except half the hay and clover, which shall arise in the last year of this demise, and the whole of the straw, chaff, and colder arising from the corn in the said last year, which half of the hay and the entirety of which straw, chaff, and colder shall be left upon the premises for the benefit of the said *A. B.*, his heirs and assigns, or his or their succeeding tenant or tenants of the same premises, for which hay it is agreed that so much money shall be paid by the person or persons receiving the benefit thereof as the same shall be reasonably worth in the judgment of two competent persons, one of them to be chosen by the said *C. D.*, his executors, administrators, or assigns, and the other of them to be chosen by the person or persons taking the same; and in case the said two persons so named shall disagree as to the amount of such valuation, then the same shall be referred to the valuation of a third competent person, to be chosen by the said two so first chosen, and the valuation so to be made by them or him, as the case may be, shall be binding and conclusive upon all the said parties; and in consideration of the said straw, chaff, and colder, the said *A. B.*, his heirs or assigns shall at his and their own costs and charges carry or cause to be carried all the corn and grain from which the said straw, chaff, and colder shall arise to any distance which the said *C. D.*, his

And stack the wheat, &c.

And expend
dung on the
farm,

And scower
ditches.

executors, administrators, or assigns, shall require, not exceeding fifteen miles from the farm-house hereinbefore demised.—And also that he the said *C. D.*, his executors, administrators, and assigns shall and will expend, spread, and lay in a husbandlike manner, where the same shall be most wanted, all and every the dung, manure, muck, and compost, that shall be made and arise during the continuance of this demise from the hay, straw, colder, clover, tares, vetches, and turnips, that shall be so spent and consumed on the said premises as aforesaid (except the dung, manure, and compost, that shall arise and be made therefrom in the last year of this demise, and the 1st day of May then next ensuing,) and shall and will turn up in heaps, and leave in the yards, or some other convenient parts of the said premises hereinbefore demised, the dung, manure, muck, and compost, so excepted as aforesaid (except such part thereof as shall be used in preparing for turnips) for the support, benefit, and nourishment of the land hereinbefore demised without any allowance being made to him or them, in respect of the same.—And also that he the said *C. D.*, his executors, administrators, or assigns, shall and will yearly and every year during the continuance of this demise, in a husbandlike manner, cut and scower, or cause to be cut and scowered, one hundred yards of the fences and ditches, upon such part of the arable lands hereinbefore demised, and fifty rods of the fences and ditches upon such part of the marsh lands as shall most require cutting and scowering; and do or cause to be done all such out-hauling, banking, and planting, necessary for that purpose, being allowed bushes, thorns, and other fencing stuff, to be taken upon the premises.—And also shall and will, on the 24th day of June, immediately preceding the expiration of this demise, give and deliver up the peaceable possession unto the said *A. B.*, his heirs or assigns, (without being entitled to any diminution in rent) one-sixth part of the arable land hereinbefore demised, and which one-sixth part shall be in olland of two years' laying, having been sown with good sound clover and rye grass, along with a crop of corn next immediately, after a crop of turnips, at the rate of 12lb. of clover and one peck of rye grass seeds per acre: and also shall and will, at the expiration of this demise, leave one other one-sixth part of the said arable land in olland

of the one year laying, having been sown as aforesaid.—And also that he the said *C. D.*, his executors, administrators, or assigns, shall and will, at proper times in the last year of this demise, plough one other one-sixth part of the arable lands hereinbefore demised, with three clean earths at the least, and shall, in due season after the same shall be ploughed, sow the same with turnip seeds, and harrow in the same, and hoe, and keep clean, and preserve the same for a crop; and, at the expiration of this demise, leave the same unfed for the benefit of the said *A. B.*, his heirs or assigns, or his or their succeeding tenant or tenants; for which turnips it is hereby agreed that he and they, or his or their succeeding tenant or tenants of the same premises shall pay unto the said *C. D.*, his executors, administrators, or assigns, so much money as the same shall be valued at and be reasonably worth in the judgment of two persons or their umpire, to be chosen as hereinbefore is mentioned. And also that he the said *C. D.*, his executors, administrators, or assigns, shall and will permit and suffer the said *A. B.*, his heirs and assigns, or his or their succeeding tenant or tenants in the same premises, and their or any of their servants and workmen, with horses and oxen, and all necessary implements of husbandry in due season, in the last year of this demise, to enter into and upon all such of the arable lands hereinbefore demised, as shall then be sown with summer corn, and to harrow and roll in the same, and shall and will give timely notice to the said *A. B.*, his heirs or assigns, or the succeeding tenant or tenants of the same premises, at the proper time when the same ought to be sown as aforesaid, and shall and will carefully protect and preserve the same from being destroyed or damaged by cattle or otherwise. And also shall and will find and provide convenient lodging room for the servants and workmen of the said *A. B.*, his heirs or assigns, or his or their succeeding tenant or tenants of the same premises, and convenient stable room for his or their horses, and for hay and straw provided for such horses, during the time of such workmen, servants, and horses being employed in sowing the said clover and other grass seeds, and in harrowing and rolling in the same. And also that he the said *C. D.*, his executors, administrators, and assigns, shall and will from time to time, and at all times during the continuance of this demise,

To plough
arable land,

to permit lessor
to enter in the
last year,

and find lodg-
ing for lessor's
workmen.

To kill moles,

and mow down
thistles.

Not to carry
away brakes,

or suffer per-
sons to sport.

Not to commit
waste.

use his and their best endeavours to kill and destroy, or cause to be killed and destroyed, all moles found in or upon the premises hereinbefore demised, or any part thereof. And also shall and will at all proper seasons in every year during the continuance of this demise, and particularly before seeding time, mow and keep down all thistles, docks, and other seeding weeds upon the said premises hereby demised, and every part thereof respectively, and shall not nor will cut or carry away from the said premises any winns or brakes between Lady-day and Michaelmas-day in any year. And also that he, the said *C. D.*, his executors, administrators, or assigns, shall not nor will permit or suffer any person or persons whomsoever to sport or trespass upon any of the said premises hereinbefore demised, or any part or parts thereof, without leave in writing from the said *A. B.*, his heirs or assigns, but shall and will at his or their request give proper notice or notices in writing to forbid any person or persons sporting or trespassing thereon; and at the like request of the said *A. B.*, his heirs or assigns, give or cause such notice or notices to be given in evidence, and proved in any court or courts, to convict any such person or persons sporting or trespassing thereon. And that it shall and may be lawful to and for the said *A. B.*, his heirs or assigns, to bring any action or actions in the name or names of the said *C. D.*, his executors, administrators, or assigns, against any person or persons who shall or may be found sporting or trespassing on the said premises hereby demised, or any part thereof, and which action or actions neither he nor they shall wilfully release, discontinue, or discharge, or become nonsuit therein, and shall not nor will disclose or make known any thing relating thereto, which may be prejudicial to the prosecuting the same, the said *A. B.*, his heirs and assigns, indemnifying the said *C. D.*, his executors, administrators, and assigns, from all costs and damages to be incurred thereby. And also that the said *C. D.*, his executors, administrators, or assigns, shall not nor will at any time or times hereafter during the continuance of this demise commit any waste upon the said premises hereby demised, or any part thereof, by felling, cutting down, grubbing up, lopping, topping, cutting, or stubbing, or cause, or willingly, or negligently permit or suffer to be felled, cut down, hewn, grubbed up, lopped,

topped, cut, or stubbed any timber, or timber-like trees, or fruit-trees, or any seedlings, stover, or young spires thereof, or any bodies of pollards or willows now growing or being, or which shall at any time or times hereafter during the continuance of this demise grow or be on the said premises hereby demised, or any part or parts thereof, nor shall nor will fell, stub, lop, top, or injure any quickthorns or bushes, except the lops and tops of the pollards, stubs and surplus thorns required for firing, and the quickthorns and bushes required for fencing, but shall and will on the contrary use his and their utmost endeavours to preserve the same from being spoiled or injured. And also shall not nor will commit any waste upon the said premises hereby demised, or any part thereof, by ploughing or digging any of the marshes or pasture ground hereinbefore demised. Provided always that notwithstanding the covenants and reservations hereinbefore contained, the said *A. B.*, his heirs and assigns, shall or may pursue any remedy in equity to which he or they would otherwise be entitled to restrain the conversion or digging of the said marshes or pasture ground, or the cutting any trees, quickthorns, or bushes, contrary to the covenants hereinbefore contained in that behalf. And the said *A. B.* doth for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said *C. D.*, his executors, administrators, and assigns, by these presents in manner following (that is to say) that he the said *A. B.* and his heirs and assigns, shall and will keep the farm-house, barns, stables, and all other buildings hereinbefore demised in good and tenantable order and repair, (other than and except such repairs as are hereinbefore covenanted to be made by the said *C. D.*, his executors, administrators, or assigns, he and they performing such covenants on his and their parts.) And shall and will on request assign and allow unto the said *C. D.*, his executors, administrators, and assigns, during the said term, proper and necessary timber and rough wood for repairing the gates, lifts, posts pales, stiles, rails, bars, and other things belonging to the said premises hereby demised, which are to be repaired by the said *C. D.*, his executors, administrators, and assigns; and also thorns, stakes, quicks, and bushes for making, mending, and repairing the hedges, ditches, groups, drains, and fences thereof, provided such bushes, stakes, and

Covenants by
the lessor
to repair cer-
tain buildings.

To suffer les-
sees use drift-
way, &c.

To enjoy
against all per-
sons claiming
through lessor.

quicks can be found thereon and not otherwise. And also shall and will permit and suffer the said *C. D.*, his executors, administrators, and assigns, to have and use the drift-way for his sheep and cattle on the lands called as the same is now set out, and shall and will permit and suffer the said *C. D.*, his executors, administrators, and assigns, to use, occupy, and enjoy the barns and stalk yards belonging to the said premises hereinbefore demised, to lay up, and thresh, and dress his and their corn and grain, and shall and will allow convenient lodging room for his and their servants and workmen employed therein until the 1st day of May next after the end of this demise. And further, that he said *C. D.*, his executors, administrators, and assigns, paying the same yearly rent of *l.* and other the rents hereinbefore reserved as the same shall become due and payable in manner and form aforesaid, and well and truly observing, performing, fulfilling, and keeping all and singular the covenants, conditions, and agreements hereinbefore contained, on his and their parts to be observed, performed, fulfilled, and kept according to the true intent and meaning of these presents, shall or lawfully may have, hold, use, occupy, possess, and enjoy all and singular the said messuage, tenement, or farm-house and other the premises hereinbefore demised or expressed, and intended so to be, with their appurtenances during the said term of twenty-one years without the lawful let, suit, trouble, or hindrance of or by the said *A. B.*, his heirs or assigns, or any person or persons whomsoever, lawfully claiming or to claim by, from, under, or in trust for him, them, or any of them.

In witness, &c.



No. III.

A Building Lease.

THIS INDENTURE, made, &c., between *A. B.*, &c., of the Premises. one part, and *C. D.* of the other part, *witnesseth*, that the said *A. B.*, in consideration of the rents, covenants, and agreements, hereinafter reserved and contained by and on the part and behalf of the said *C. D.*, his executors, administrators, and assigns, to be paid, done, and performed, *hath* demised, leased, set, and to farm let, and by these presents *doth* demise, lease, set, and to farm let, unto the said *C. D.*, his executors, administrators, and assigns, *all* that piece or parcel of ground, situate, lying and being, on, &c., in the said parish of containing in breadth on the north side thereof and in depth on the east side thereof be the same more or less, and on the west side thereof east and from thence south and from thence east, be the same more or less, together with the messuages or tenements, and other the erections and buildings thereon, which the said *C. D.* shall have full liberty to pull down, and to take to and for his own use; which said piece or parcel of ground abuts north on aforesaid, south on gardens to some houses on the north side of belonging to the said *A. B.*, now on lease to east on buildings, &c., and west, &c., and is more fully delineated and described in the plan or ground plot thereof, in the margin of these presents, together with all erections and buildings to be erected and built thereon, and all ways, paths, passages, drains, water, water-courses, easements, profits, commodities, and appurtenances, whatsoever, belonging,

and which shall belong to the said hereby demised premises,
Habendum. or any part or parcel thereof, *to have and to hold* the said piece
 or parcel of ground, messuages, or tenements, erections, build-
 ings, and premises, hereby demised or intended so to be, with
 their and every of their appurtenances, unto the said *C. D.*,
 his executors, administrators, and assigns, from the
 day of last past, before the date thereof, for and during
Reddendum. and unto the full end and term of years, from thence
 next ensuing, and fully to be complete and ended, *yielding and*
paying therefore for the first year of the said term hereby de-
 mised, the rent of a pepper corn on the last day thereof, if de-
 manded, and yielding and paying therefore yearly, and every
 year, for and during the remaining years of the said
 term hereby demised, unto the said *A. B.*, his heirs and assigns,
 the yearly rent or sum of £ of lawful money of Great
 Britain, by half yearly payments, on the and in
 each year, by even and equal portions, the first payment thereof
 to begin and be made on the said several rents to
 be paid and payable from time to time, on the several
 feasts aforesaid, during the said term, free and clear of all
 rates, taxes, charges, assessments, and payments whatsoever,
 taxed, charged, assessed, or imposed upon the said hereby
 leased premises, or any part thereof, by authority of parlia-
 ment or otherwise howsoever, during the term hereby
Covenants by granted. *And* the said *C. D.*, for himself, his heirs, exe-
the lessee. cutors, administrators, and assigns, doth covenant, promise,
 and agree, to and with the said *A. B.*, his heirs and
 assigns, by these presents, in manner following, (that is to say)
 that the said *C. D.*, his heirs, executors, administrators, and
 assigns, shall and will yearly, and every year during the last
To pay rent years of the said term hereby granted, well and
 truly pay, or cause to be paid unto the said *A. B.*, his heirs
 and assigns, the said yearly rent or sum of £ of lawful
 money of Great Britain, on the several days and times, and in
 the manner hereinbefore limited and appointed for payment
 thereof, without making any deduction or abatement thereout,
 for or in respect of any rates, taxes, assessments, duties, charges,
 or impositions whatsoever, taxed, charged, assessed, or imposed
 upon the said hereby demised premises, or any part thereof,
 during the said term hereby granted, all which rates, taxes,

assessments, duties, charges, or impositions, he the said *C. D.*, And taxes.
 his executors, administrators, or assigns, shall and will bear,
 pay, and discharge, and of and from the same, acquit, save
 harmless, and keep indemnified the said *A. B.*, his heirs and
 assigns. And that he the said *C. D.*, his executors, admini- To build
 strators, or assigns, shall and will, before the expiration of the houses.
 first year of the term hereby granted, at his and their own pro-
 per costs and charges, erect, build, complete, and in a work-
 manlike manner finish, one or more good and substantial brick
 messuages or tenements, upon some part of the ground hereby
 demised, and shall and will lay out and expend therein the sum
 of £. or upwards, and also that he the said *C. D.*, his
 executors, administrators, and assigns, shall and will, from time
 to time, and at all times, from and after the said messuage or
 tenement, erections, and buildings on the said piece of ground
 hereby demised, shall be respectively completed and finished, And repair.
 during the remainder of the said term hereby granted, when,
 where, and as often as need or occasion shall be and require,
 at his and their own proper costs and charges, well and suf-
 ficiently repair, uphold, support, maintain, pave, purge, scour,
 cleanse, empty, amend, and keep the said messuage or tene-
 ment, messuages or tenements, erections, and buildings, and all
 the walls, rails, lights, pavements, grates, privies, sinks, drains,
 and watercourses, thereunto belonging, and which shall belong
 unto the same, in, by, and with all and all manner of needful
 and necessary reparations, cleansings, and amendments what-
 soever. And that he the said *C. D.*, his executors, admini- Not permit
 strators, and assigns, shall not, nor will, during the said term offensive
 hereby granted, permit or suffer any person or persons to use, trades to be
 exercise, or carry on, in and upon the said hereby demised pre- carried on.
 mises, or any part thereof, any trade, business, or other occu-
 pation, which may be nauseous or offensive, or grow to the
 annoyance, prejudice, or disturbance of any of the other tene-
 ments of the said *A. B.* near adjoining thereto, or the occu-
 piers thereof: and the said messuage or tenement, messuages
 or tenements, erections, buildings, and premises, with the To quit at the
 walls, pavements, sewers, and drains belonging thereto, be- end of the term.
 ing in every respect so well and sufficiently repaired, up-
 held, supported, sustained, maintained, paved, purged, scoured,
 cleansed, emptied, amended, and kept, shall and will, at the
 expiration, or sooner determination of the said term hereby

To insure,

And rebuild in
case of fire.

To permit lessor
to enter
and view, &c.

granted, peaceably and quietly leave, surrender, and yield up unto the said *A. B.*, his heirs and assigns, together with all the doors, locks, keys, bolts, bars, wainscots, chimney-pieces, slabs, foot-paces, windows, window-shutters, partitions, dressers, shelves, pumps, water-pipes, rails, and all other things which shall be any ways fixed and fastened to, and shall be standing, being, and set up, in and upon the said premises hereby demised, or any part thereof within the last years of the said term hereby granted. *And* that the said *C. D.*, his executors, administrators, and assigns, shall and will, at his and their own proper costs and charges, from time to time sufficiently insure all and every the messuages or tenements, erections and buildings, which shall be erected and built upon the said piece or parcel of ground hereby demised, or any part thereof, from casualties by fire, during the then remainder of the said term hereby granted, in some or one of the public offices kept for that purpose in *London* or *Westminster*; and in case the said messuage or tenements, erections and buildings, or any of them, or any part of any of them, shall, at any time or times during the said term, be burnt down, destroyed, or damaged by fire, shall and will, from time to time, immediately afterwards, rebuild, or well and sufficiently repair the same. *And further*, that it shall and may be lawful to and for the said *A. B.*, his heirs and assigns, or any of them, with workmen or others, in his, their, or any of their company, or without, to enter or come into and upon the said demised premises, and every part thereof, at seasonable and convenient times, in the day-time, at any time or times, during the last seven years of the said term hereby granted, in order to make an inventory or schedule of the several fixtures and things then standing and being, in and upon the said hereby demised premises, which are to be left at the end of the said term, for the use of the said *A. B.*, his heirs and assigns, pursuant to the covenant hereinbefore in that behalf contained; and also twice or oftener in every year, during the said term hereby granted, to view, search, and see the defects and want of reparations of the said premises, and all defects and want of reparations, which upon every or any such view or search shall be from time to time found, to give or leave notice or warning thereof in writing, at or upon the said demised premises, unto, and for the said *C. D.*, his executors, administrators, or assigns, to repair and amend the same. *And* that the said *C. D.*, his

executors, administrators, or assigns, shall and will, within three months next after every such notice or warning shall be or given or left as aforesaid, at his and their own proper costs and charges, well and sufficiently repair, amend, and make good, all and every the defects and want of reparations, whereof such notice or warning shall be so given or left as aforesaid. *Provided always*, and these presents are upon this condition, that if the said yearly rent, or sum of *l.* hereby reserved, or any part thereof, shall be behind and unpaid, by the space of days, next after either of the said feasts or days of payment, whereon the same ought to be paid as aforesaid, (being lawfully demanded,) or if the said *C. D.*, his executors, administrators, or assigns, shall not well and truly observe, perform, fulfil, and keep, all and every the covenants, articles, clauses, conditions, and agreements, in these presents expressed and contained, on his and their part and behalf to be performed and kept according to the true intent and meaning thereof, then, and from thenceforth, in either of the said cases, it shall and may be lawful, to and for the said *A. B.*, his heirs and assigns, into, and upon the said demised premises, or any part thereof in the name of the whole, wholly to re-enter, and the same to have again, retain, repossess, and enjoy, as in his and their first, and former estate, and the said *C. D.*, his executors, administrators, or assigns, and all other tenants or occupiers of the said premises, thereout, and from thence utterly to expel, put out, and amove, and that from and after such re-entry made, this present lease, and every clause, article, and thing, herein contained on the lessor's part and behalf, from thenceforth to be done and performed, shall cease, determine, and be utterly void, to all intents and purposes whatsoever, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. *And* the said *A. B.*, for himself, his heirs, and assigns, doth hereby covenant, promise, and agree, with and to the said *C. D.*, his executors, administrators, and assigns, that he, the said *C. D.*, his executors, administrators, and assigns, paying the said yearly rent hereby reserved, in manner and form aforesaid, and observing, performing, and keeping all and singular the covenants and agreements, hereinbefore contained, and on his and their part and behalf to be performed and kept, shall and may lawfully, peaceably and quietly have, hold, occupy, possess, and enjoy the said piece or parcel of ground

And lessee to
repair after
notice.

Condition for
re-entry.

Covenant by
lessor for quiet
enjoyment.

and premises hereby demised, with their and every of their appurtenances, for and during the said term of years hereby granted, without any lawful let, trouble, denial, or interruption, of or by the said *A. B.*, his heirs or assigns, or any other person or persons, lawfully claiming or to claim, by, from, or under him, them, or any of them.

Witness.

A. B.

C. D.

No. III.

Power to appropriate Land for Streets, &c.

Power for the trustees to appropriate land for roads, &c.

AND it is hereby agreed, that it shall be lawful for the said trustees and trustee for the time being, or any of them, at any time or times, with the consent and approbation of the person or persons, if any, being adult and free from all disabilities except coverture (and coverture is not to be deemed a disability), who for the time being shall be entitled to the rents, issues, and profits of the said lands and hereditaments to set out and allot and appropriate any part or parts of the same lands and hereditaments (either including or excluding the sites of all or any of the houses, erections, or buildings now standing and being, or building and forming on the same lands,) as and for roads, streets, mews, ways, avenues, passages, drains, sewers, reservoirs, watercourses, or other easements and conveniences, and to make and form into or for roads, streets, mews, ways, avenues, passages, drains, sewers, reservoirs, watercourses, or other easements and conveniences, the lands so set out, allotted, and appropriated as aforesaid, and also to divide the lands and hereditaments aforesaid into such lots, or in such way and manner as shall be thought most beneficial, and also to fence and inclose all or any of the lots into which the said lands shall be so divided as aforesaid, and also to remove, fill up, arch over, cover in, stop, and divert any mounds, pits, dykes, ditches, ponds, drains, and watercourses in or upon the said lands aforesaid comprised in the said powers of leasing, and also to dig, sell, and dispose of all

To allot and fence in.

To cover in, stop, and divert dykes and water-courses, &c.

such timber, gravel, sand, brick earth, clay, and stone, and other earth, soil, or mineral as it shall be found convenient to cut, fell, or remove for effecting any of the objects or purposes aforesaid. And further, that whenever, at any time or times, any part or parts of the said hereditaments, shall be demised or leased by virtue of or under the aforesaid power for that purpose hereinbefore contained, such lease or leases respectively may be made with or under and subject to covenants or stipulations to be entered into or made by or on the part of the lessee or lessees to contribute towards the expences of making and keeping in repair any roads, streets, mews, ways, sewers, drains, or other conveniences now or hereafter to be laid out and made in, upon, over, through, or under any part or parts of the hereditaments aforesaid, or with or under and subject to any of such covenants or stipulations; and that it shall be lawful for the said trustees or trustee for the time being of the said power of leasing hereinbefore contained, with such consent and approbation as aforesaid, in any such lease or leases of any part or parts of the lands and hereditaments aforesaid, or in the contract for the same, to reserve the right of making and laying out any roads, streets, mews, ways, sewers, drains, or other conveniences in, upon, over, or under the lands and hereditaments to be demised or leased, or any part or parts thereof, at the time of such lease or leases being contracted for or granted, or at any subsequent time or times to be fixed upon by them or him, and to reserve any rights of road or way at the time of such lease being contracted for or granted, or at any subsequent time or times to be fixed upon by them or him, and also to reserve any rights of using any sewers or drains, or any other rights, easements, or conveniences in, upon, over, through, or under the lands and hereditaments to be demised or leased, and to grant unto the lessee or lessees of any part of the said lands and hereditaments any rights of road or way, or of making or using any roads, ways, mews, sewers, drains, or other conveniences through, over, or under in or upon any part or parts of the said lands and hereditaments which shall not have been demised, or of using any roads, ways, mews, sewers, drains, or other conveniences which, or the right of enjoyment whereof, shall have been reserved through, over, under, in, or upon any part or parts of the said lands and hereditaments which shall have been demised or leased. And further, that

To sell timber and minerals.

Leases under the power contained in the will may be made subject to certain covenants,

and reservations.

To apply
trust-funds.

it shall be lawful for the said trustees or trustee for the time being acting in execution of the trusts aforesaid, or any of them, to apply a sufficient part of the monies to arise under or by any sale or sales to be made by them or him as herein-before mentioned, or which shall otherwise come to their or his hands or hand under or by virtue of any trusts herein contained in or towards the payment and discharge of all the costs, charges, and expences of or attending or in anywise relating to the laying out, making, or forming such roads, ways, streets, avenues, mews, passages, drains, sewers, reservoirs, watercourses, or other easements and conveniences, appropriations and improvements as aforesaid, and surveying the estates aforesaid, and drawing or making plans or maps thereof for the purpose of building thereon, or for any other of the purposes aforesaid, and also the costs and charges of the surveyors and agents to be employed by the said trustees or trustee in or about surveying or superintending the laying out and making of the said roads, ways, streets, avenues, mews, passages, drains, sewers, reservoirs, watercourses, and other easements and conveniences, and the erecting and building of the said messuages, erections, and buildings, and of all or any of the other objects and purposes which they and he are and is under powers of leasing for building purposes herein contained authorized to carry into effect.



No. IV.

Mining Lease.

THIS INDENTURE made between *A. B.*, of
of the one part, and *C. D.*, of _____, gentleman, of the
other part, Witnesseth, that in consideration of the rents, covenants, and agreements hereinafter reserved and contained, and on the part and behalf of the said *C. D.*, his executors and administrators to be paid, kept, observed, and performed: he the said *A. B.* hath demised, leased, set, and to farm let, and by these presents, doth demise, let, set, and to farm let

unto the said *C. D.*, his executors and administrators, all [*describe the premises*] and all outhouses, barns, stables, cow-houses, dovehouses, edifices, buildings, gardens, orchards, Lands. yards, common of pasture, common of turbary, mounds, fences, hedges, ditches, ways, paths, passages, waters, watercourses, privileges, liberties, commodities, emoluments, advantages, and appurtenances whatsoever to the said messuage, tenement, lands, and premises belonging and in anywise appertaining. And also all and every the mines, collieries, veins, and seams Mines. of coal and culm of every quality which now are or may be opened or discovered by any means in or underneath the said messuage, tenement, lands, and premises, or any part or parts thereof, with full right and liberty of digging, sinking, and working collieries, mines, pits, and shafts, and of driving drafts and watercourses for the winning or getting of coal or culm upon or out of the said premises, and for the carrying away of waters or slyth therefrom; and also, of using such ground-room, heap-room, and pit-room, for laying the said coal or culm as shall be necessary; and also, in or upon any part of the said premises to erect and make bridges, tramroads, and other ways, and of repairing the same; and also, of making and building within or upon any part of the said premises all such mills, gins, engines, and buildings as shall be necessary for the purpose of working such collieries or mines, and for the keeping of such horses and other cattle as shall be used in the working thereof; together with all the engines, hovels, machines, implements, pits, shafts, levels, tramroads, watercourses, and appurtenances to the said premises belonging and in anywise appertaining, and the reversion and reversions, remainder and remainders of him the said *A. B.*, in and to the same premises and every part thereof respectively, (excepting and always reserving unto the said lessor and his heirs, all timber Exceptions. and timber like and other trees and underwood standing, growing, or being upon the said premises or any part thereof) to have and to hold the messuage, tenement, lands, mines, collieries, veins, and seams of coal and culm, and all and singular other the premises hereinbefore demised or expressed Habendum. and intended so to be with their appurtenances unto the said *C. D.*, his executors and administrators from the 25th day of March now instant, for and during and unto the full end and term of twenty-one years thence next ensuing, and fully to be complete and ended, (subject nevertheless to be determined as

hereinafter is mentioned) yielding and paying for and in respect of the said messuage, tenement, and lands hereinbefore mentioned and demised, yearly and every year during the continuance of the said term, the rent or sum of fifty pounds of lawful money of Great Britain, on the 24th day of June; the 29th day of September; the 25th day of December, and the 25th day of March, in every year, by even and equal portions; the first payment thereof to be made on the 24th day of June next ensuing the date hereof; and also, yielding and paying for and in respect of the said mines, collieries, veins, and seams of coal and other the premises hereby demised, a yearly rent or royalty at and after the rate of one shilling for each and every ton of the first 10,000 tons of the coal or culm which may be got and obtained from or out of the said collieries or mines in any one year of the said term, and at and after the rate of eleven pence for each and every ton of the said coal or culm, which may be got and obtained from or out of the collieries or mines in any one year of the said term, over and above the said first 10,000 tons, and so that the yearly rent or royalty, which shall be accruing and payable for and in respect of the said coal or culm, shall not, whether any coal or culm shall to such extent be got or worked in any one year or not of the said term, from and after the 24th day of June now next be less than 100%, and such rent or royalty to be payable by equal half-yearly payments in every year, and such respective rents, royalties, or yearly payments as aforesaid, to be made without any deduction or abatement whatsoever; and the said C. D., doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said A. B., his heirs and assigns, in manner following, (that is to say) that he the said C. D., his executors or administrators, shall and will from time to time during the continuance of the said term of twenty-one years, well and truly pay or cause to be paid unto the said A. B., his heirs and assigns, the said several rents, royalties, or yearly payments hereinbefore respectively reserved or made payable on the several days and times in that behalf hereinbefore appointed, according to the true intent and meaning of these presents; and that he the said C. D., his executors or administrators, shall and will from time to time, and at all times hereafter during the continuance of the said term of twenty-one years, pay, bear, and discharge, all and every the tithes, rates,

Rent certain.

Royalty.

Covenant by
lessee,

to pay rent,

and taxes.

or commutation rent in respect thereof, taxes, charges, assessments, outgoings, and payments whatsoever (except the land-tax) wherewith the said demised premises or any part or parts thereof respectively, or the said *A. B.*, his heirs, executors, administrators, and assigns, or the said *C. D.*, his executors or administrators, in respect thereof, shall or may at any time or times during the same term be assessed or charged by authority of parliament or otherwise howsoever ; and also, that he the said *C. D.*, his executors or administrators, shall and will from time to time and at all times hereafter during the continuance of the said term of twenty-one years, at his or their own proper costs and charges, when, where, and as often as need shall be or require, To repair, well and sufficiently repair, support, uphold, sustain, maintain, amend, and keep the said messuage or tenement, cottages, and premises hereby demised with their and every of their appurtenances, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever ; and also, glaze, gravel, pave, empty, cleanse, and amend all the glass windows, gravel walks, pavements, posts, pales, rails, privies, sinks, gutters, and drains to the same premises belonging or appertaining, when and as often as occasion shall require ; and the said messuage, tenement, cottages, and premises so being in by and with all things well and sufficiently repaired, supported, sustained, maintained, glazed, gravelled, paved, cleansed, amended, and kept at the end or sooner determination of the said term of twenty-one years which shall first happen, shall and will peaceably and quietly leave, surrender, yield, and give up unto the said *A. B.*, his heirs or assigns ; and also, shall and will in every year of the said term of twenty-one years, at his or their own costs and charges, paint or cause to be painted, all the outside woodwork and and paint. ironwork of or belonging to the said messuage or tenement twice with good and proper oil colour in a workmanlike manner ; and further, that he the said *C. D.*, his executors and administrators, shall and will peaceably and quietly permit and suffer, and it shall and may be lawful to and for the said *A. B.*, his heirs and assigns, and every of them, with or without workmen or others, twice or oftener in every year during the continuance of the said term of twenty-one years, at his or their will and pleasure, at convenient times in the day-time, to enter and come into and upon the said hereby demised premises or

To manage
lands in a
husband-like
manner.

Not to injure
timber.

To work the
mines.

Keep accounts.

any part or parts thereof, to view, search, and see the state and condition of the reparations thereof, and of all such decays, defaults, and wants of reparation as shall upon every such view be found, to give or leave notice in writing at or in the said messuage or tenement to and for the said *C. D.*, his executors and administrators, to repair and amend the same within the time and space of three months after such notice or warning given or left as aforesaid; and he, the said *C. D.*, doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said *A. B.*, his heirs and assigns, to repair and amend all and every the same defects and decays, and wants of reparation accordingly, of which such notice or warning shall be given or left as aforesaid; and also, that he the said *C. D.*, his executors or administrators, shall and will from time to time, and at all times during the continuance of the said term of twenty-one years manage and manure the lands hereby demised in a good and husbandlike manner, according to the best and most approved course of husbandry used and employed by farmers in the said county of , and shall not nor will at any time or times during the continuance of the said term, fell, cut down, lop, top, stub up, take, carry away, spoil, or destroy, or cause or suffer to be felled, cut down, lopped, topped, stubbed up, taken, carried away, spoiled, or destroyed, any timber or timber like or other trees or underwood now growing, or which at any time during the continuance of the said term, shall or may be growing, or being in or upon the said demised premises or any part or parts thereof, but on the contrary, shall and will at all times during the continuance of the said term, take all reasonable care to preserve the same timber and timber like and other trees and underwood, and to prevent the same from being injured or destroyed; and also, that he the said *C. D.*, his executors and administrators, shall and will, with all convenient speed, seek, win, get, and raise, all the coal and culm lying within and under the said messuage, tenement, lands, and premises hereinbefore demised or intended so to be, and in so doing, shall and will at all times during the continuance of the said term of twenty-one years, pursue the best and most improved methods in the working of the mines, collieries, pits, and works, which shall or may be opened for the seeking and getting the said coal or culm; and also, shall and will during

the continuance of the said term, keep true books of account of all the coal and culm which shall from day to day be raised and got in or out of the said collieries and works, and deliver true and faithful monthly copies thereof to the said *A. B.*, his heirs and assigns, and if thereunto required by the said *A. B.*, his heirs or assigns, or any of them, verify such monthly accounts or any of them upon oath or solemn affirmation before any magistrate of or for the said county of ; and also, shall and will from time to time and at all times during the continuance of the said term, maintain, sustain, uphold, and keep, with all needful and necessary repairs, all and every the buildings, engines, hovels, machines, pits, shafts, levels, tramroads, ways, watercourses, and watergates, which now are or at any time or times during the continuance of the said term, shall or may be built, sunk, drove, or made, in, upon, or underneath the said messuage, tenement, lands, and premises hereinbefore demised or intended so to be, or any of them for the purpose of working the collieries and works aforesaid, and winning, getting, and carrying away the coal and culm, or for the accommodation of labourers thereon, and shall and will at the expiration or sooner determination of the said term, in such good repair, order, and condition leave and yield up the said buildings, engines, hovels, machines, pits, shafts, levels, tramroads, ways, watercourses, and watergates, unto the said *A. B.*, his heirs and assigns; and also, that he the said *C. D.*, his executors or administrators, shall not nor will at any time or times during the continuance of the said term of twenty-one years, set, let, or assign over the said demised messuage, tenement, lands, and premises and the collieries and works thereon or thereunder, as aforesaid; or any part or parts thereof respectively, without the consent in writing of the said *A. B.*, his heirs or assigns, for that purpose first had and obtained, but so as that the said consent of the said *A. B.*, his heirs or assigns, be not withheld without a reasonable ground or cause in that behalf: provided always, that in case any difference shall arise between the parties hereto, as to the reasonableness of any such ground of objection, the same shall be referred to and determined by the arbitration of two persons, one to be named by each of the said parties; and in case of a difference between the said arbitrators, to and by an umpire, to be named and chosen by them; and further, that it shall and may be lawful to and for the said

Keep buildings,
&c. in repair.

And yield up.

Reference to
arbitration.

Lessee may
employ en-
gineer to sur-
vey, &c.

Agreement by
landlord to
pay for engines,
&c.

Power for
lessee to deter-
mine lease, if
collieries fail to
produce
tons yearly.

A. B., his heirs and assigns, at all times during the continuance of the said term of twenty-one years, at his own proper costs and charges, to have and employ any one person being an engineer or collier (to be approved of by the said *C. D.*, his executors, or administrators) for the purpose of viewing and examining the state and condition of the said collieries and works, and the manner of working and conducting the same, and of ascertaining the quantity of coal and culm which shall or may be got, procured, and carried away therefrom; and for that purpose that such person from time to time, and at all times during the continuance of the said term hereby granted, shall have free ingress, egress, and regress into, from, through, and out of the said collieries and works, and shall and may from time to time, and at all times as aforesaid, inspect and examine the said books of account, to be kept as aforesaid; and it is hereby further agreed and declared, that at the end or expiration of the said term of twenty-one years, by effluxion of time, the said *A. B.*, his heirs and assigns, shall pay the said *C. D.*, his executors or administrators, for all the engines, hovels, machines, pits, shafts, tramroads, levels, and implements, which shall be left upon the premises hereby demised, according to a fair valuation to be made thereof by two indifferent persons, one to be chosen by each of the said parties, and in case of their disagreement, by an umpire, to be chosen by the arbitrators for that purpose; but in case the said *C. D.*, his executors or administrators, shall abandon the said collieries and works before the expiration of the said term of twenty-one years, by effluxion of time, and there shall be coal and culm capable of being worked by them to profit, that then the said engines, hovels, machines, pits, shafts, tramroads, levels, and implements, shall be taken by the said *A. B.*, his heirs and assigns, for his own absolute use and benefit, without any compensation or remuneration whatsoever being made to the said *C. D.*, his executors or administrators in respect of the same: and it is hereby further agreed and declared, that if the collieries and works to be opened as aforesaid, be not capable of producing coal or culm, to the quantity of 2000 tons in each and every year of the said term, that then and in such case, and when and as the same shall be found to fail therein, it shall and may be lawful to and for the said *C. D.*, his executors or administrators, on giving six calendar months' notice thereof to the said *A. B.*,

his heirs or assigns, and paying all arrears of rent due and payable by virtue hereof, and performing the covenants and agreements on his behalf herein contained up to that time, at the end of such six calendar months, to yield and give up the said demised premises unto the said *A. B.*, his heirs or assigns, and then and from thenceforth, this indenture and every matter, clause, and thing herein contained, shall cease, determine, and be absolutely void, notwithstanding any thing herein contained to the contrary, he the said *C. D.*, his executors and administrators, nevertheless, in such last mentioned case, leaving all the levels, pits, and other works, (except the tramroads) which shall be then, in, or upon the said demised premises, in good repair, for the absolute use and benefit of the said *A. B.*, his heirs and assigns, and in case the said *A. B.*, his heirs or assigns, shall by any writing under his hand at the end of such six calendar months, declare his option to take the said tramroads at a fair valuation, then leaving all the tramroads in or upon the said premises in like good repair, and thereupon the said tramroads shall be valued and paid for in like manner, as hereinbefore is mentioned and provided on the event of the expiration of the said term of twenty-one years, by effluxion of time: provided always, and these presents are upon this express condition, that if the said several rents, royalties, or other yearly payments hereinbefore respectively reserved, or any of them, or any part thereof respectively, shall be in arrear and unpaid for the space of days next after any of the said days or times on which the same respectively ought to be paid as aforesaid, or in case of the breach or non-performance of all or any of the covenants or agreements hereinbefore contained, and on the part and behalf of the said *C. D.*, his executors or administrators, to be kept, observed, and performed then and in any of the said cases, it may and shall be lawful to and for the said *A. B.*, his heirs and assigns, at any time or times thereafter into and upon the premises hereby demised, or any of them, or any part thereof respectively, in the name of the whole to re-enter, and the same to have again, repossess, and enjoy, as in his first or former estate, any thing hereinbefore contained to the contrary thereof notwithstanding; and the said *A. B.* doth hereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the said *C. D.*, his executors and administrators, that

Leaving all levels, &c., except tramroads.

Power for landlord to take the tramroads.

Power of re-enter.

Covenants by landlord.

he, the said *C. D.*, his executors and administrators, well and truly paying, performing, fulfilling, and keeping all and every the rents, covenants, and agreements herein mentioned and contained, and on his part to be paid, done, and performed, shall and may at all times hereafter, during the continuance of the term and estate hereby granted, and of every other demise or lease to be hereafter granted, as hereinafter is mentioned, peaceably and quietly have, hold, occupy, possess, and enjoy all and singular the premises hereby demised, with the appurtenances without the let, suit, trouble, disturbance, or eviction of or by him the said *A. B.*, or his heirs or assigns, or any other person or persons lawfully claiming or to claim, by, from, or under or in trust for him, them, or any of them: And lastly, that he the said *A. B.*, his heirs and assigns shall and will at any time within from and after the expiration by effluxion of time of the said term of twenty-one years hereby granted, at the request, costs, and charges, of the said *C. D.*, his executors or administrators, by indorsement on these presents and the counterpart thereof, or by some separate deed or writing at the election of the said *C. D.*, his executors or administrators, but whereof there shall be a part or counterpart executed by the said *C. D.*, his executors or administrators demise and grant all and singular the said demised premises unto the said *C. D.*, his executors or administrators as aforesaid, for, during, and unto the full end and term of twenty-one years, to commence and be computed from the day of the expiration, by effluxion of time, of the said term hereby granted, as aforesaid, and thenceforth next ensuing at, under, and subject nevertheless to such and the like rents, royalties, reservations, covenants, provisoes, and agreements as are hereby and herein reserved, expressed, and contained.

To renew.

In witness, &c.



No. V.

An Indorsement for extending an Existing Term, &c.

THIS INDENTURE, &c., between the within named *A. B.* of the one part, and the within named *C. D.* of the other part, witnesseth, that in consideration of the rent hereby reserved, and of the covenants, conditions, and agreements respectively hereinafter contained, and on the part and behalf of the said *C. D.*, his executors, administrators, and assigns, to be paid, done, and performed, the said *A. B.* hath demised, leased, set, and to farm let, unto the said *C. D.*, his executors, administrators, and assigns, *all* that piece or parcel of ground, with the messuage or tenement thereon, erected and built, and all and singular other the premises respectively comprised in the within written lease, and thereby demised to the said *C. D.*, (except as therein is excepted) *to have and to hold* the said piece or parcel of ground, messuage or tenement, and all and singular other the premises hereby demised or intended so to be (except as aforesaid) unto the said *C. D.*, his executors, administrators, and assigns, from the day of , which will be in the year , and when the said within written lease will expire, for, during, and unto the full end and further term of years, from thence next ensuing, and fully to be complete and ended, subject to, and under the like rent, and payable in like manner, as is within mentioned, for and in respect of the rent in and by the within written indenture reserved and subject to the like power of entry, as well on non-payment of rent, as on the happening of any of the other incidents mentioned in the within written proviso or condition of re-entry, *and* it is hereby declared and agreed, by and between the said parties to these presents, and each of them doth hereby, for himself, his heirs, executors, and administrators, covenant with the other of them, his executors and administrators, that they, the said parties respectively, and their respective heirs, executors, administrators, and assigns, shall and will, by these presents, during the continuance of the

additional term of years hereby granted, stand, and be bound to the other of them, his executors and administrators, for and in respect of the said hereby demised premises with the appurtenances, in such and the like covenants, conditions, and agreements respectively, as they the said parties and their respective heirs, executors, administrators, and assigns, do now stand bound to the other of them, his executors and administrators, in and by the within written lease for and during the now residue unexpired of the within mentioned term within granted, it being the intent and meaning hereof, that this present lease, and the additional term hereby granted, shall be upon such and the like footing, and all the covenants, clauses, conditions, and agreements, respectively within contained, shall be equally available, take place, and have the like force and effect, to all intents and purposes, during the lease hereby granted, as if every article, clause, matter, and thing, contained in the within written lease, were inserted and contained in this present indenture.

In witness, &c.

ASSIGNMENTS.

No. I.

An Assignment by Deed-poll indorsed.

KNOW all men by these presents, that I, the within named *C. D.*, in consideration of the sum of of lawful money of Great Britain, to me in hand paid by *G. F.* of gent. at or before the sealing and delivery of these presents, the receipt whereof I do hereby acknowledge, have bargained, sold, and assigned unto the said *G. F.* all and singular the messuage, or tenement, yard, garden, coach-house, stables, out-houses, and hereditaments and premises, in and by the within written indenture demised or mentioned so to be, with their appurtenances,

and all my estate, right, title, interest, term of years, claim and demand whatsoever, in and to the same premises, To have and to hold the said messuage or tenement, buildings, garden, and other the premises hereby assigned or mentioned so to be, with the appurtenances, unto the said *G. F.*, his executors, administrators, and assigns, henceforth, for all the residue now to come and unexpired of the within mentioned term of twenty-one years, and of such other term or terms as I the said *C. D.*, now have therein respectively, subject nevertheless to the rent, covenants, and agreements in the said indenture respectively reserved and contained, and which henceforth on the part of the tenant or lessee of the same premises are, or ought to be, paid, done, and performed.

In witness, whereof, &c.

No. II.

An Assignment of a Lease by Indorsement.

THIS INDENTURE, made, &c. between the within-named *H. H.* of &c. of the one part, and *J. J.* of &c. of the other part, Witnesseth, that in consideration of the sum of pounds of lawful money of Great Britain, to him the said *H. H.* in hand paid by the said *J. J.* at or before the sealing and delivery of these presents, the receipt whereof the said *H. H.* doth hereby acknowledge, he the said *H. H.* hath bargained, sold, and assigned, and by these presents doth bargain, sell, and assign, unto the said *J. J.*, his executors, administrators, and assigns, all and singular the messuage or tenement, dwelling-house, and premises within demised, or intended so to be with the appurtenances, and all the estate, right, title, interest, term and terms of years yet to come and unexpired, use, trust, property, claim and demand whatsoever, both at law and in equity, of him the said *H. H.*, in, and to the same premises, and every part thereof, To have and to hold the said messuage or tenement, dwelling-house and premises, unto the said *J. J.*, his executors, administrators, and assigns, from the

day of now last past, for and during all the residue now to come and unexpired of the term of by the within indenture of lease granted, free and clear of, and from all arrears of rent, rates, and taxes whatsoever, up to the said day of last. *But subject, nevertheless,* to the payment of the rent, and to the observance of all and singular the covenants, conditions, and agreements within reserved and contained. And the said *H. H.* doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with the said *J. J.*, his executors, administrators, and assigns, in manner following, (that is to say,) that he the said *H. H.* shall and will well and truly pay, or cause to be paid, all the rent, taxes, charges, rates, and assessments due in respect of the said premises hereby assigned up to the day of last. *And further,* that he the said *H. H.* hath not at any time heretofore made, done, committed, or executed, or willingly permitted, or suffered any act, deed, matter, or thing whatsoever, whereby the said within written indenture of lease, messuage, or tenement, dwelling-house, and premises hereby assigned, or any part thereof, are, is, can, shall or may be, impeached, charged, affected, or incumbered in title, charge, estate, or otherwise howsoever, and that for and notwithstanding any such act, deed, matter, or thing as aforesaid, the within written indenture of lease is a good and effectual lease, valid in the law; and that the rent and covenants therein and thereby reserved and contained, have been hitherto well and truly paid, kept, and performed. And that for and notwithstanding any such act, deed, matter, or thing as aforesaid, he, the said *H. H.*, now hath in himself good right, full power, and lawful and absolute authority, to assign the said premises, with the appurtenances unto the said *J. J.*, his executors, administrators, and assigns, in manner aforesaid, and according to the true intent and meaning of these presents. *And also* that he, the said *J. J.*, his executors, administrators, and assigns, shall and may from time to time, and at all times hereafter during all the rest, residue, and remainder of the said term of peaceably and quietly have, hold, use, occupy, possess, and enjoy the said messuage, or tenement, and dwelling-house and premises hereby assigned; and receive and take the rents, issues, and profits thereof without the lawful let, suit, trouble,

denial, eviction, or interruption of or by him, the said *H. H.*, his heirs, executors, or administrators, or any other person or persons lawfully claiming, or to claim, by, from, under, or in trust, for him, them, or either of them. *And further*, that he the said *H. H.*, his heirs, executors, administrators, and all and every other person or persons, lawfully claiming or to claim, from by, under, or in trust for him, them, or any of them, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges in the law of the said *J. J.*, his executors, administrators, or assigns, make, do, and execute, or cause to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, and things, assignments, and assurances in the law whatsoever, for the further, better, and more perfect and absolute assigning, assuring, and confirming the said premises with the appurtenances, unto the said *J. J.*, his executors, administrators, or assigns, for all the rest, residue, and remainder of the said term, as he or they, or his or their counsel in the law, shall reasonably devise or advise and require. *And* the said *J. J.*, for himself, his executors, administrators, and assigns, doth hereby covenant, promise, and agree, to and with the said *H. H.*, his heirs, executors, and administrators, in manner following, (that is to say,) that he, the said *J. J.*, his executors, administrators, and assigns, shall and will, from time to time, and at all times from the said day of during the residue of the said term of years, well and truly pay, or cause to be paid, unto such person or persons as for the time being shall be entitled to receive the same, the yearly rent by the within written indenture of lease reserved and made payable when and as the same shall from time to time henceforth become due and payable. *And also* well and truly perform, fulfil, and keep all and singular the covenants, clauses, provisoes, and agreements in the said lease contained, and which from the day of are or ought on the part of the lessee or assignee of the same premises to be paid, observed, and performed. *And also* shall and will from time to time, and at all times, well and sufficiently save, defend, keep harmless and indemnified, the said *H. H.* his heirs, executors, administrators, and assigns, from and against all costs, charges, damages, and expenses whatsoever, which they or any or either of them shall or may sustain, or become liable to,

for by reason or on account of the non-payment by the said *J. J.*, his executors, or administrators of all or any part of the said rent from time to time to become due for or in respect of the said premises hereby assigned from and after the said day of or for by reason or on account of the non-observance or non-performance by him or them of all or any of the covenants, provisoes, and agreements in the within indenture contained, and which as from the said day of are or ought on the part of the said , his executors, administrators, or assigns, to be kept, observed and performed.

In witness, &c.

N. B.—If a lease is made by husband and wife, the rent should be reserved to them and the heirs of the wife, and the covenants should be in a similar form.

NOTICES.

No. I.

Notice to Quit to Tenant from Year to Year.

Mr. *C. D.*,

I hereby give you notice to quit and deliver up on the day of next, the possession of the messuage or dwelling-house, [*or of the farm lands and premises, or of the rooms and apartments,*] with the appurtenances, which you now hold of me, situate at, &c. Dated the day of 18—.

Yours, &c.

To Mr. *C. D.*

A. B.

No. II.

The like where the commencement of the Tenancy is uncertain.

Mr. C. D.,

I hereby give you notice to quit and deliver up on the day of next, the possession of the messuage or dwelling-house, [*or "rooms and apartments," or farm lands and premises,"*] with the appurtenances, which you now hold of me, situate in the parish of in the county of provided your tenancy originally commenced at that time of the year; or otherwise, that you quit and deliver up the possession of the said messuage, &c. at the end of the year of your tenancy, which shall expire next after the end of one-half year from the time of your being served with this notice. Dated the day of 18—.

Yours, &c.

To Mr. C. D.

A. B.

No. III.

Notice by an Agent of the Landlord.

Mr. C. D.,

I do hereby as the agent for and on the behalf of your landlord, Mr. A. B. of give you notice to quit and deliver up possession of the premises situate at, &c., now in your occupation, on the day of or on the expiration of the current year of your tenancy. Dated the day of 18—.

Yours, &c.

A. B.

No. IV.

Notice to quit Lodgings.

SIR,

I hereby give you notice to quit and deliver up on or before next the rooms or apartments, and other tenements which you now hold of me in this house [*as the case may be.*]

Witness my hand, this day of in the year

To Mr. C. D.

A. B.

No. V.

Notice to the Tenant either to quit the Premises, or pay double Value.

SIR,

I hereby give you notice to quit and yield up on the
 day of next, possession of the messuage, lands, tene-
 ments, and hereditaments which you now hold of me, situate
 at in the parish of and county of
 in failure whereof I shall require and insist upon double the
 value of the said premises according to the statute in such
 case made and provided. Dated this day of
 Yours, &c.

To C. D.

A. B.

No. VI.

Notice to quit by the Tenant.

SIR,

I hereby give you notice that on the day of I
 shall quit possession of the messuage or tenement and pre-
 mises which I now hold of you, situate at in the parish
 of in the county of . Dated this day of
 18—.

Yours, &c.

To A. B.

C. D.

No. VII.

Notice by the Tenant to quit Lodgings.

SIR,

This is to give you notice that on the day of
 next I shall quit and deliver up possession of the rooms and
 apartments and other tenements which I now hold of you in
 this house.

Witness my hand this day of 18—.
 To A. B.

C. D.

No. VIII.

Notice to Tenant to Repair.

SIR,

You are hereby required to put in good and tenantable repair all and singular the messuage or tenement and premises which you now hold of me, situate at, &c. Particularly [*as the case may be.*]

Witness my hand this day of

To C. D.

A. B.

No. IX.

Notice to Tenant to pay Rent.

SIR,

This is to warn you that unless you pay, or cause to be paid to me, on or before the day of next, the sum of being a year's rent due on the day of for the messuage or tenement and premises which you now hold of me, at the yearly rent of situated, &c. I shall claim and insist upon such forfeiture thereof as I may be by law entitled to.

Witness my hand.

To C. D.

A. B.

No. X.

Warrant of Distress.

To Mr. A. B. my bailiff.—Distrain the goods and chattels of C. D. (the tenant,) in the house he now dwells in (or on the premises in his possession,) situate in in the county

of for pounds, being one year's rent, due to me for the same at Christmas day last ; and for your so doing this shall be your sufficient warrant and authority. Dated the day of 18—.

J. S.

The party distraining will then seize some article in the house in the name of all the other goods on the premises, and make an inventory of the goods seized and give notice of distress.

No. XI.

Notice of Distress to Tenant.

Mr. C. D.

Take notice, that I have this day distrained (or, that as bailiff to *J. S.* your landlord, I have this day distrained) on the premises above-mentioned, the several goods and chattels specified in the above inventory, for the sum of pounds, being one year's rent, due to me (or, to the said (*J. S.*) at Christmas day last, for the said premises ; and that unless you pay the said rent, with the charges of distraining for the same, or replevy the said goods and chattels within five days from the date hereof, they will be appraised and sold according to law. Given under my hand, the day of in the year

W. T.

This notice should be written and subscribed on the bottom of a copy of the inventory. If the goods are secured on the premises, the fact may be noticed thus, "and have secured the same in, &c."

If the tenant consents to the goods remaining on the premises beyond the five days allowed by law, a memorandum in the form following, should be signed by him.

Memorandum, That I, *A. B.* do hereby consent and agree that *C. D.* my landlord, who hath distrained my goods and chattels for the rent in a dwelling-house, &c., [*describing the premises*], situate at in the county of , shall

continue in the possession of my said goods and chattels in the said dwelling-house, &c., for the space of days from the date hereof, the said *C. D.* having agreed to forbear the sale of the said goods and chattels for the said space of time to enable me to discharge the said rent, and I the said *A. B.* do hereby agree to pay the expences of keeping the said possession. As witness my hand the day of in the year of our Lord 18 .

Witness, *R. S.*

A. B.

Fees to the Man in Possession.

The man in possession of the goods, &c., is to be paid *2s. 6d. per day*, if the tenant keep him; and *3s. 6d.* if he keep himself. But if the rent do not exceed *20l.*, the fees are regulated by the *57 Geo. III. c. 93.*

List of Fees according to Schedule to 57 Geo. III. c. 93.

	£	s.	d.
Levying distress - - - -	0	3	0
Man in possession, per day - - -	0	2	6
Appraisement, whether by one broker or more, sixpence in the pound on the value of the goods -			
Stamp, the lawful amount thereof - -			
All expences of advertisements, if any such -	0	10	0
Catalogues, sale and commission, and delivery of goods, one shilling in the pound on the net produce of the sale - - - - -			

No. XII.

Notice of Distress of Standing Corn.

Take notice, that I have this day as bailiff of (your landlord,) taken and distrained on the premises above-mentioned, the several growing crops specified in the inventory, for the sum of pounds, being one year's rent, due to the said at Lady Day last for the said premises; and unless you previously pay the said rent with the costs of distraining the same, I shall proceed to cut, gather, make, cure, carry, and lay up the crops when ripe in the barn or other proper place on the said premises, and in convenient time, sell and dispose

of the same towards satisfaction of the said rent and of the costs of the distress, appraisement, and sale according to the form of the statute in that case made and provided. Given under my hand, this day of

—◆—
No. XIII.

Appraiser's Oath, &c.

“ You, and each of you, shall well and truly appraise the goods and chattels mentioned in this inventory (holding it in his hand), according to the best of your judgment. So help you God.”

Then indorse on the inventory the following memorandum:—

Memorandum
thereof.

“ Memorandum: that on the day of in the year of our Lord *A. B.* of, &c., and *C. D.* of, &c., two sworn appraisers, were sworn upon the Holy Evangelists, by me *J. K.* of, &c., constable, well and truly to appraise the goods and chattels mentioned in this inventory, according to the best of their judgment.

“ As witness my hand,
J. K., Constable.”

“ Present at the time of swearing the said *A. B.* and *C. D.* as above, and witness thereto.

“ *L. M.*

“ *O. P.*”

After the appraisers have valued the goods, continue the indorsement on the inventory as follows:—

“ We, the above-named *A. B.* and *C. D.* being sworn upon the Holy Evangelists, by *J. K.* the constable above-named, well and truly to appraise the goods and chattels mentioned in this inventory, according to the best of our judgment; and, having viewed the said goods and chattels, do appraise the same at the sum of pounds. As witness our hands the day of in the year

“ *A. B.* } Sworn Appraisers.
“ *C. D.* }

The stamp duty on appraisements by the 55 Geo. III. c. 184, is as under :—

	£	s.	d.
If not exceeding 50l. - - -	0	2	6
Exceeding 50l., and not 100l. - -	0	5	0
Exceeding 100l., and not 200l. - -	0	10	0
Exceeding 200l., and not 500l. - -	0	15	0
Exceeding 500l. - - -	1	0	0

No. XIV.

Notice to Sheriff when in possession on an Execution.

To *N. O.* }
 and } Esqrs. Sheriffs of Middlesex.
E. F. }

Take notice, that the sum of for one year's [*as the case now is*] rent due at last, is now due from *E. N.* the person to whom the goods belong of which you are now in possession, by virtue of her Majesty's writ of returnable [*state the writ and return.*]

As witness my hand, this day of 18—.

No. XV.

Replevin Bond and Assignment.

Know all men by these presents, that we *A. B.* of , Replevin bond.
C. D. of , and *E. F.* of , are jointly and severally held
 and firmly bound to *G. H. Esq.*, sheriff of the county of ,
 in the sum of pounds, [*double the value of the cattle or goods distrained*], of lawful money of Great Britain to be paid to the
 said sheriff, or his certain attorney, executors, administrators, or
 assigns, for which payment to be well and truly made We bind
 ourselves and each and every of us, in the whole our and each
 and every of our heirs, executors and administrators firmly
 by these presents, sealed with our seals. Dated the
 day of in the year of the reign of our Sovereign
 Lady Victoria, by the Grace of God of the United Kingdom
 of Great Britain and Ireland, Queen, Defender of the Faith,
 and in the year of our Lord 18—.

The condition.

Now the condition of the above written obligation is, that if the above bounden *A. B.* do appear at the next county Court, to be holden for the county of at on the day of next, and do then and there prosecute his suit with effect and with out delay against *L. M.*, for the taking and unjustly detaining of his cattle, goods, and chattels, to wit [*here set forth the cattle or goods distrained*], and do make a return of the said cattle, goods, and chattels, if a return thereof shall be adjudged, then this present obligation shall be void and of none effect, or else shall be and remain in full force and virtue.

Sealed, &c.

Assignment thereof.

Know all men by these presents, that I, *G. H. Esq.* sheriff of the county of have at the request of the within named *L. M.* the avowant, [*or person making cognizance*], in this cause, assigned over this replevin bond unto him the said *L. M.* pursuant to the statute in that case made and provided. In witness whereof, I have hereunto set my hand and seal of office this day of 18 .

Sealed, &c.

Precept to replevy.

———— (to wit) *G. H. Esq.* sheriff of the county aforesaid to the bailiff of the hundred of , in the said county, and to *John Doe* and *Richard Roe* my bailiffs, and to every of them jointly and severally greeting. Forasmuch as *A. B.* hath found me sufficient security as well for prosecuting his suit with effect against *L. M.*, for taking and unjustly detaining his cattle, and goods, to wit, &c., [*setting out the cattle and goods*], which the said *L. M.* hath taken and unjustly detains, as it is said, as also for making return thereof, if return thereof shall be adjudged. Therefore, on behalf of the said *A. B.*, I command you and every of you jointly and severally, that, without delay, you replevy and cause to be delivered to the said *A. B.*, his cattle, goods, and chattels, and that you immediately summon the said *L. M.* to appear at our next county Court, to be holden at in and for the said county, to answer the said *A. B.* in the plea aforesaid, and in what manner you shall have executed this precept, certify to me at the county Court, to be held at the time and place aforesaid, under the peril attending the neglect thereof. Given under the seal of my office, this day of in the year of our Lord, 18 .

_____ (to wit) By virtue of a warrant from the sheriff of the county of _____ to me directed, I summon you to appear at the next county Court, to be holden at _____ in and for the county aforesaid, to answer *A. B.* in a plea of taking and unjustly detaining his cattle, goods, and chattels. Summons
thereon.

Dated the _____ day of _____ 18—.

To Mr. *L. M.*

X. Y. Bailiff.

FORMS OF PROCEEDING.

No. I.

Notice to be affixed in case of Vacant Possession.

A. B.

Take notice, that upon the complaint of *E. A.* of _____ in the county of _____ made unto us *A. P.* and *B. P.* Esqrs. two of her Majesty's justices of the peace for the said county, that you the said *A. B.* have deserted the messuage and tenement called _____ consisting of _____, situate, lying, and being, at _____ aforesaid, in the county aforesaid, unto you demised at rackrent by the said *E. A.*, and that there is in arrear and due from you the said *A. B.* unto the said *E. A.* one whole year's rent for the said demised premises, and that you have left the said premises uncultivated and unoccupied, so that no sufficient distress can be had to countervail the said arrears of rent; we the said justices, (having no interest, nor either of us having any interest in the said demised premises,) on the said complaint as aforesaid, and at the request of the said *E. A.*, have this day come upon and viewed the said demised premises, and do find the said complaint to be true; and on the _____ day of this present month of _____ we will return to take a second view thereof: and if upon such second view you, or some other person on your behalf, shall not appear and pay the said rent in arrear, or there shall not be sufficient distress on the said premises, that we the said justices will put the said *E. A.* into the possession of the said demised pre-

of and that the said tenancy expired [*or was determined by notice to quit given by the said as the case may be*], on the day of the said did serve on [*the tenant overholding*] a notice in writing of his intention to apply to recover possession of the said tenement [*a duplicate of which notice is hereto annexed*] by giving, &c. [*describing the mode in which the service was effected*], and that notwithstanding the said notice the said refused [*or neglected*] to deliver up possession of the said tenement and still detains the same.

Taken the day of before us

(Signed.)

A duplicate of the notice of intention to apply is to be annexed to this complaint.

No. IV.

Warrant to Peace Officers to take and give Possession.

Whereas [*set forth the complaint*] We, two of Her Majesty's justices of the peace in petty sessions assembled, acting for the of do authorize and command you on any day within days from the date hereof [*except on Sunday, Christmas Day, and Good Friday, to be added if necessary,*] between the hours of nine in the forenoon and four in the afternoon to enter [by force if needful], and with or without the aid of [*the owner or agent as the case may be*], or any other person or persons whom you may think requisite to call to your assistance into and upon the said tenement, and to eject thereout any person, and of the said tenement full and peaceable possession to deliver to the said [*the owner or agent.*]

Given under our hands and seals this day of

To and all other constables
and peace officers acting for the
district of .

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THE END.

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